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**BACKGROUND MATERIALS FOR A  
BRIEFING ON THE MINISTRY OF THE  
ATTORNEY GENERAL TO BE GIVEN TO**

**THE RT. HON. S.C. SILKIN, P.C., Q.C., M.P.  
ATTORNEY GENERAL OF ENGLAND**

**AND TO**

**WILLIAM BECKETT, ESQ.  
LEGAL SECRETARY TO THE ATTORNEY  
GENERAL OF ENGLAND**

**AUGUST 16, 1978  
TORONTO, ONTARIO**

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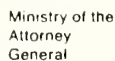
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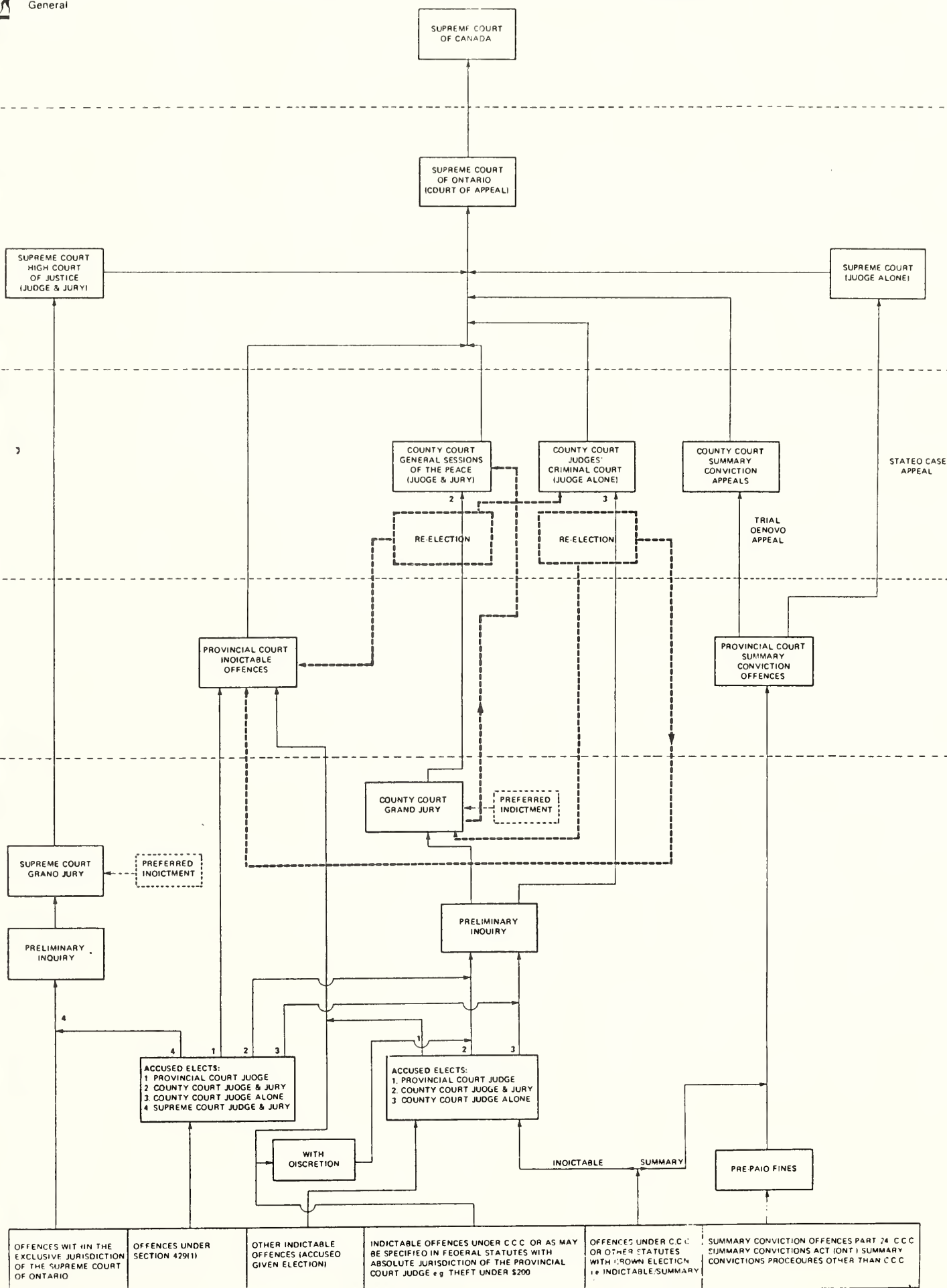
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## CHAPTER 61

# The Office of the Attorney General

THE office of the Attorney General in this Province antedates Confederation. It was recognized in the British North America Act,<sup>1</sup> but nowhere are the powers, functions and duties of the office set out by statute. Certain traditional powers are conferred on the holder of the office under the Criminal Code, which are unnecessary to develop in the present discussion.

Under the British North America Act, all rights, powers, duties, functions, responsibilities or authorities vested in or imposed on the Attorney General by any law, statute, or ordinance of Upper Canada, are vested in the person appointed to that office, until the Legislature of Ontario otherwise provides.<sup>2</sup>

Since there is no specific legislation defining these duties, resort must be had to the common law. It is wise that in large measure this should be so, and it would be unwise to attempt to codify the law with respect to all powers, functions and duties of the office. In no province has this been done. Nevertheless, we think that it would be useful to define in express language some of the powers, functions and duties pertaining to the office, as has been done in seven of the provinces in Canada and by the Federal Parliament with respect to the

<sup>1</sup>B.N.A. Act, s. 134.

<sup>2</sup>*Ibid.*, s. 135.



office of the Attorney General of Canada. This we shall discuss in more detail later.

The Attorney General is the chief law officer of the Crown and in that sense is an officer of the public. It is to him that the individual must look for the protection of his civil rights, whether it be through the enforcement of the criminal law—to provide adequate protection of the innocent and ensure as far as possible the just punishment of the guilty—or whether it be as guardian of the interests of the public against legislation that may confer excessive or oppressive powers on tribunals, bodies or individuals.

As the chief law officer of the Crown, the Attorney General performs two main functions. He is the Queen's Attorney and as such is responsible for the public, as distinct from the private, prosecution of offenders, and he is the responsible adviser of the Government with respect to legislation. Historically and traditionally, in the exercise of these functions the holder of the office must exercise a degree of independence quite different from that required of any other member of the Cabinet.

Throughout English history, much responsible opinion has been against the Attorney General's being a member of the Cabinet. In earlier years the Attorney General was not permitted to be a member of the House of Commons. Those who maintained this point of view contended that the duties of the office were such that he was required to exercise a degree of independence that would be inconsistent with his being a member of the Cabinet or even a member of Parliament. The early arguments were based on constitutional grounds that have never been applicable in Canada. These grounds involved the conflict between the authority of the House of Lords and of the Commons.

In its origin, the function of the Attorney General was to conduct suits, particularly prosecutions, on behalf of the sovereign. He later became an adviser to the House of Lords, and at the beginning of the sixteenth century he was "the principal go-between the two Houses of Parliament, carrying bills and messages from the Lords to the Commons, and drafting or amending parliamentary measures when called



upon to do so".<sup>3</sup> It is unnecessary to discuss here the debate that raged in England for and against the propriety of the Attorney General's being both a member of the House of Commons and a member of the Cabinet. It is sufficient to say that only in recent years in England has he been a member of the Cabinet.

The situation has been otherwise in Canada, but it was not accepted without argument. In 1850 the Select Committee appointed to inquire into the state of public income and expenditure of the Province of Canada heard conflicting testimony from former and present law officers on the desirability of changing the political character of the office of Attorney General in Upper Canada. Mr. John Hilliard Cameron, Q.C., a former Solicitor General of Upper Canada, was in favour of excluding the Attorney General from the provincial Cabinet on the ground that: "The Law Officers at present are obliged to give legal opinions, with a knowledge of their political consequence, and be responsible for them. In the mode I propose, the legal opinions given would be totally irrespective of any political bearing, and ought to be independent of the cases to which they may be applied." And, referring to the fact that the Attorney General and Solicitor General of England are not Cabinet Ministers, he said: "In consequence, their legal opinions upon questions proposed by the government are given without any knowledge of the inducements to such opinions being asked or the political consequences to flow from their answers."<sup>4</sup>

The view taken by the Attorney General for Lower Canada before the Committee was that membership in the Cabinet was essential as long as the Attorney General occupied a position as head of an administrative department. Although the subject was not dealt with in the Report of the Committee, the view of the Attorney General of Lower Canada is the one that prevailed both before and since Confederation, and it appears to be the sound view. The Attorney General must be answerable to the Legislature and it is better that he be answerable as a Minister of the Crown. Notwithstanding that this is so, he must of necessity occupy a different

<sup>3</sup>Edwards, *The Law Officers of the Crown*, 34.

<sup>4</sup>*Ibid.*, 166.





position politically from all other Ministers of the Crown. As the Queen's Attorney he occupies an office with judicial attributes and in that office he is responsible to the Queen and not responsible to the Government. He must decide when to prosecute and when to discontinue a prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations. They are decisions made as the Queen's Attorney, not as a member of the government of the day. Professor Edwards, in his admirable book, sums up the matter in this way:

"Care, however, must be taken to distinguish between two separate aspects of the Attorney-General's and Solicitor-General's criminal law responsibilities, since failure to do so may unwittingly result in a weakening of the doctrine of independence. First, it is now well recognised that any practice savouring of political pressure, either by the executive or Parliament, being brought to bear upon the Law Officers when engaged in reaching a decision in any particular case, is unconstitutional and is to be avoided at all costs. Acceptance of this first principle, however, in no way minimises the complementary doctrine of the Law Officers' ultimate responsibility to Parliament, in effect the House of Commons, for the exercise of their discretionary powers. To be explicit, it is conceived that, *after the termination of the particular criminal proceedings*, the Attorney-General or the Solicitor-General, as the case may be, is subject to questioning by members of the House in the same way as any other Minister of the Crown. Like any other Minister they are answerable for their ministerial actions."<sup>5</sup>

The duty of the Attorney General, to give legal advice on legislation and to advise departments of government, requires a lesser degree of independence than his decision to prosecute or to discontinue a prosecution. In that capacity he is not in the same sense the adviser of the Queen. Nevertheless, this function requires a substantial degree of independence. The members of the public must be dependent on the vigilance of the Attorney General for their protection against legislative invasion of their civil rights. Departments of government must realize that in advising on legislation and advising

<sup>5</sup>*Ibid.*, 224. Author's italics.



departments, the Attorney General has a duty that transcends government policy, in the performance of which he is responsible only to the Legislature. This we shall discuss in greater detail later.

Until 1966 many duties were imposed on the Attorney General that were in no way relevant to his traditional office and in many cases those duties conflicted with his traditional functions. Many of the officers for whom he was responsible performed licensing duties, conducted investigations and exercised judicial powers and delegated legislative powers. In some cases the Attorney General was required to prosecute individuals for breaches of the criminal law, notwithstanding that the same individuals had already been disciplined by a tribunal for which he was responsible.

In 1966 the responsibility for the administration of thirteen Acts that were not related to the office of the Attorney General was transferred to the Minister of Financial and Commercial Affairs.<sup>6</sup> The Acts were:

- The Bailiffs Act, 1960-61
- The Collection Agencies Act
- The Credit Unions Act
- The Deposits Regulation Act, 1962-63
- The Insurance Act
- The Investment Contracts Act
- The Loan and Trust Corporations Act
- The Marine Insurance Act
- The Mortgage Brokers Registration Act
- The Prepaid Hospital and Medical Services Act
- The Real Estate and Business Brokers Act
- The Securities Act, 1966
- The Used Car Dealers Act, 1964

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<sup>6</sup>Department of Commercial and Financial Affairs Act, Ont. 1966, c. 41, s. 4.



## CHAPTER 62

# Functions and Duties of the Attorney General

THE functions and duties of the Attorney General as they have developed in this Province may be considered under the following headings:

- (1) Supervision of the machinery of justice;
- (2) Supervision of law enforcement;
- (3) Supervision of government litigation;
- (4) Supervision of legislation.

### SUPERVISION OF THE MACHINERY OF JUSTICE

In broad outline, supervision of the machinery of justice involves: supervision of the Ontario Provincial Police; the appointment and supervision of the staff necessary for the administration of justice; the supervision of crown attorneys, the Public Trustee, the Official Guardian, the probation officers, and the Accountant of the Supreme Court. In addition, the Attorney General is responsible for recommending the appointment of magistrates, crown attorneys, juvenile and family court judges, division court judges who are not county or district court judges, and for the administration of the law respecting the registration of titles to real property.

Elsewhere in this Report we deal with many aspects of the functions performed by those for whose appointment the Attorney General is responsible. While it is not part of our duty to make a detailed study of the operation of the machinery of justice in all its aspects, we are concerned with its



operation in providing adequate protection for the civil rights of the individuals making up the community.

An unfortunate aspect of the machinery of justice in this Province is that it is not entirely under the control of the Province. In some cases the local authorities provide accommodation for its operation in whole or in part, and in some cases this is provided by the Province. In some cases the staff is in part provided by the local authorities and in part provided by the Province, and in other cases the staff is provided in whole by the Province. These matters we have fully discussed in Section 5 of this Part.

If the machinery of justice is to operate efficiently, it is essential that the full responsibility for its operation be placed on the Attorney General. It is equally important that the staff engaged in the operation of the machinery of justice should be highly qualified and well paid. Efficiency is dependent on the quality of those engaged in the day-to-day operation of the courts. On the whole, in this Province we have been particularly fortunate with respect to the quality of the staff engaged in the courts, but too often the margin of reasonable compensation for the services rendered has been so narrow that competent and qualified members of the staff have been forced to abandon this branch of public service for economic reasons.

## SUPERVISION OF LAW ENFORCEMENT

Law enforcement may be divided into three main branches which have no clear lines of demarcation: investigation, policing and prosecution. We have dealt at length with investigation and certain aspects of the exercise of police powers elsewhere in this Report.<sup>1</sup>

We are particularly concerned here with the duties of the Attorney General as they relate to the prosecution of offenders and to law enforcement through the administration of justice.

The effectiveness of all legislation for the protection of the civil rights of the individual depends on good law enforcement. The individual has a right to be protected from unwarranted police action, but likewise the peaceful citizen has

<sup>1</sup>See Part I, Section 5, and Chapter 47 *supra*.





a right to all the protection of the law enforcement agencies against unjustified invasion of his basic and fundamental civil rights. Too often the focus is misplaced and the rights of peaceful members of society are forgotten.

In this Province we have entered upon a new era which creates special problems for the law enforcement agencies. Modern means of transportation, the automobile and the aeroplane, together with modern means of communication, two-way radio systems and electronic listening devices, have become as available for use by organized and unorganized criminal elements as they are for the peaceful purposes of society. In some areas on this continent organized crime has become so developed as to impair the power and authority of government. The protection of the rights of the individual requires that all the advances of technology be made available to law enforcement agencies with proper safeguards. It is no trespass on the civil rights of the individual that every scientific means of detecting crime should be properly used for the protection of the public interest. Geography has placed us alongside a nation with different laws and different means of law enforcement. It is a recognized fact that organized crime abroad is prepared to reach its tentacles into this Province in such a way as to make residents of the Province in some degree subject to the power of criminal elements from abroad. The right of the individual to the protection of his civil rights under law does not extend to the safeguarding of the lawless against all reasonable and proper means of detecting his lawlessness.

Representations were made to the Commission to the effect that legislation should be passed restricting the use of wire-tapping and listening devices by police officers. Some representations were made suggesting that the right of police officers to question persons accused of crime should be restrained or restricted. These representations raise difficult problems, but they are problems that must be solved by a realistic and unemotional approach. It is hard to follow the logic of the contention that it should be unlawful to intercept a message passed as part of a plot to rob or assassinate,



while the robbers or assassins should have free use of all scientific means of communication. What gives rise to misgivings is that there might be an unwarranted invasion of the privacy of the individual by the exercise of police powers of interception of communications. The question is one of balance and regulation. Where law enforcement agencies have reasonable ground to believe that means of communication are to be used for the advancement of crime, they should be given means to secure power to intercept messages. This is no greater trespass on the rights of the individual than the power now conferred on a peace officer to arrest without a warrant, or to get search warrants upon application to a justice of the peace.

The control over the exercise of such power should undoubtedly be strict, but nevertheless the power should exist. It does not seem logical that a power should be conferred on a police officer to deprive a man of his liberty by arresting him if he has reasonable and probable grounds to believe that he has committed an indictable offence, but that he should not have power to intercept a message if he can demonstrate to a judicial officer that there are reasonable and probable grounds to believe that the message is being used for the advancement of the commission of a crime.

In large measure any change in the law would be beyond the powers of the Legislature of the Province and beyond the Terms of Reference of this Commission.

### **Supervision of Prosecutions on Behalf of the Crown**

As we have indicated earlier in this Section, one of the most important historic and traditional duties of the Attorney General has been to direct, and in many cases participate in, the prosecution of criminal cases. In England the holder of the office frequently appears personally in the courts to carry out these duties. In Canada we have adopted a system somewhat patterned on that of Scotland.<sup>2</sup>

Prosecutions on behalf of the Crown are conducted by agents of the Attorney General—crown attorneys or counsel specially appointed.

<sup>2</sup>For a brief description of the Scottish system, see Chapter 49 *supra*.



The duties and functions of crown attorneys are defined by statute.<sup>3</sup> Formerly it was the practice in the Province to appoint special counsel to prosecute all cases at sittings of assizes in the Province. These duties are now usually performed by the crown attorneys. If the law is to be properly enforced, it must be recognized that the office of Crown Attorney requires highly developed professional skill in advocacy. Advocacy is not a talent that can be acquired by mere appointment to an office. Crown counsel is frequently matched against the best legal talent available. In our adversary system, the interests of the individual will be ill-protected if crown counsel is not equal to his task. The office requires more than skill in advocacy. It requires great capacity to master the detail of involved and difficult cases and great fairness in the conduct of them.

To secure and retain young men in this branch of the government service, it is essential that there be a realistic approach to the scale of salaries that must be paid. It is too much to expect of members of the bar, who have the necessary qualifications required of good crown attorneys, to enter and remain in the public service at salaries now paid to the crown attorneys and their assistants. Of the sixty-seven crown attorneys and assistants:

|    |          |                      |            |
|----|----------|----------------------|------------|
| 1  | receives | a salary of \$20,000 | a year;    |
| 17 | receive  | \$15,000 per annum   | or over;   |
| 11 | "        | \$14,000-\$15,000    | per annum; |
| 7  | "        | \$13,000-\$14,000    | " "        |
| 9  | "        | \$12,000-\$13,000    | " "        |
| 4  | "        | \$11,000-\$12,000    | " "        |
| 3  | "        | \$10,000-\$11,000    | " "        |
| 1  | "        | \$ 9,000-\$10,000    | " "        |
| 7  | "        | \$ 8,000-\$ 9,000    | " "        |
| 4  | "        | \$ 7,000-\$ 8,000    | " "        |
| 3  | "        | \$ 6,000-\$ 7,000    | " "        |

With the exception of the City of Toronto and the County of York, in addition to his duties as crown attorney, the holder of the office performs duties as Clerk of the Peace.

<sup>3</sup>Crown Attorneys Act, R.S.O. 1960, c. 82, ss. 6, 12, 14, 16 and 17.



Eight crown attorneys in the Province are paid on a fee basis and four are on cominuted fees. We have discussed elsewhere in this Report the whole question of payment of those engaged in the administration of justice on the basis of fees paid by those who are subject to the administration of justice.<sup>4</sup> We have recommended abolition of the system. What we said in that chapter applies with emphasis to the payment of counsel appearing on behalf of the Crown on the basis of fees assessed against convicted persons. This system gives to prosecuting counsel a pecuniary interest in obtaining a conviction. A mere statement of the fact should be sufficient to condemn the system. We recommend that all crown attorneys should be placed on a salary basis which is in no way connected with a fee system.

Not only should the salaries of the crown attorneys be substantially increased, but there should be a complete reorganization of their duties.

Crime knows no territorial boundaries. The crown attorneys are appointed for counties. Obviously some will be ill-trained and inexperienced in the prosecution of certain offences. Some are quite inexperienced and ill-trained in the conduct of cases before juries. To meet this situation, an amendment was made to the Crown Attorneys Act in 1964 to provide that in addition to crown attorneys appointed for each county and each judicial district, such crown attorneys and assistant crown attorneys for the Province may be appointed as the Lieutenant Governor in Council considers necessary.<sup>4a</sup> Three crown attorneys at large have been appointed, and assistant crown attorneys when appointed are at large. These appointments do not fulfil the organizational needs, nor are they a fulfilment of the purposes of the Act.

In order that the efficiency of crown attorneys may be raised, the Province should be divided into districts with a Senior Crown Attorney appointed for each district who should be responsible to the Director of Public Prosecutions. The Senior Crown Attorney should be capable of taking the most difficult and involved cases in his district and he should be

<sup>4</sup>See Chapter 38 *supra*.

<sup>4a</sup>Crown Attorneys Act, R.S.O. 1960, c. 82, s. 1(1), as amended by Ont. 1964, c. 15, s. 1(1); and s. 1(2), as amended by Ont. 1967, c. 18, s. 1.





charged with the duty of advising, assisting and training the crown attorneys under his supervision. The appointment should not be made on a basis of seniority but should be strictly based on ability. Such reorganization should bring to the enforcement of the law a cohesion and efficiency that cannot be attained under the present system. If the recommendations contained in Section 5 of this Part are implemented, the reorganization of all law enforcement agencies will be greatly facilitated.

### **SUPERVISION OF GOVERNMENT LITIGATION**

Civil litigation on behalf of the government or government agencies covers a wide field, ranging from tort law to involved matters of judicial review of decisions of tribunals, and matters of difficult constitutional law. We have discussed at length in this Report procedure before tribunals, rights of appeal and rights of judicial review. If our recommendations are implemented, it will be necessary to expand the branch of the Attorney General's Department dealing with civil matters. The legal affairs of all government agencies should be under the direct control of the Attorney General. Not infrequently government boards have their own solicitors who are in no way connected with the government service, e.g., the Farm Products Marketing Board, and not infrequently when a decision of a particular tribunal is called in question on judicial review, outside counsel is brought in to argue the case. This practice will not promote a coherent development of policy with respect to the exercise of powers conferred on administrative bodies.

We recommend that all matters brought before the courts should come under the direct supervision of the Attorney General and his staff. He should truly function as Chief Counsel for the Crown, not necessarily by taking cases himself, but by being responsible for the conduct of all cases.

### **SUPERVISION OF LEGISLATION**

The study made by this Commission of the legislation in force in Ontario has convinced us that much of it is drawn for the purpose of advancing particular departmental points of view as to what is in the public interest, without much regard



for the essential consideration of the protection of basic civil rights.

Legal services for the government are provided by twenty-six qualified lawyers attached to the Attorney General's Department, and forty-one, attached to different departments of government. The Attorney General's Department is divided into five main divisions, with the Deputy Attorney General at the apex: Legislative Counsel, Senior Crown Counsel, Criminal Law Division (including Criminal Appeals), Special Prosecutions Branch and Administration of Justice Division (including the Inspector of Legal Offices). Within these divisions the day-to-day legal business of the government is carried on.

The forty-one lawyers attached to the various departments serve mainly as departmental solicitors. Their experience tends to departmentalize them so that their legal advice to the department on ordinary matters that arise daily, and on legislation, does not have the objectivity that is essential for the protection of the broad public interest.

Legislation usually originates in the departments. The social programme to be carried out is formulated by the officials of the Department under the control and supervision of the relevant Minister. A bill is then drafted by the departmental solicitor who, in due course, sometimes very shortly before it is presented to the Legislature, sends it to the Legislative Counsel for revision. Often Legislative Counsel has to perform his duties under the pressure of the urgency of legislative time. In making his revision he, in the main, acts on instructions from the Minister of the Department concerned.

The course presently followed does not, in our opinion, sufficiently recognize that matters of policy to be decided in the preparation of bills fall into two categories:

- (1) Social policy underlying the social programme formulated in the department concerned, which becomes government policy when accepted by the government;
- (2) Legal policy as to the appropriate legal mechanism to be established to carry out the social programme.

Considerations of legal policy are of cardinal importance in preparing bills conferring the power to determine, take



away or change rights of individuals. Earlier in this Report<sup>5</sup> we enumerated the main aspects of legal policy that must be considered in drafting every bill containing such a power:

1. The appropriate nature and scope of the power;
2. The proper constitutional structure and organization of the tribunals on which the power is conferred;
3. The procedure to safeguard rights to be followed in the exercise of the power;
4. The extent to which provision should be made for reconsideration of initial decisions through appeals;
5. The extent to which proper judicial review should be available; and
6. Provision, where relevant, for compensation where loss or damage will result from the exercise of the power.

Some or all of these matters must be dealt with whatever may be the nature of the social programme under consideration.

The major fault in the present system is that the responsibility for deciding the legal policy to be followed is not placed clearly on the Attorney General, whose constitutional responsibility it is; nor is he given a proper opportunity to discharge it. The departmental solicitor cannot, and should not, be expected to discharge the responsibility of the Attorney General. Although he may have a particular familiarity with the branch of law to which a bill relates, his association with the administrative operation of his department will always tend to restrict his objectivity and breadth of view. His major interest will be to draft a bill that assures the administrators in his department that they can meet any administrative contingency with a minimum of hindrance. The inevitable tendency is to confer broad powers with few procedural requirements and little provision for appeals, in disregard of fundamental legal policy.

Reliance on the departmental solicitor has other disadvantages. A departmental solicitor may not appreciate the extent to which a draft bill may affect other areas of law

<sup>5</sup>Part I, Section 2 *supra*.



or administration. Law in its true sense cannot be departmentalized.

Proposed legislation may require consideration and amendment of other statutes, or modification of the prescribed policy. What may advance a taxation scheme may at the same time affect a welfare scheme, or it may be contrary to legal policy developed for the protection of civil rights.

We are concerned with something much more than orderly drafting. We are concerned with legislative supervision in a broad sense. The duty of the Attorney General to supervise legislation imposes on him a responsibility to the public that transcends his responsibility to his colleagues in the Cabinet. It requires him to exercise constant vigilance to sustain and defend the Rule of Law against departmental attempts to grasp unhampered arbitrary powers, which may be done in many ways. Sometimes clear language is used, but more often subtle devices are resorted to by incorporating in legislation such phrases as "if the minister is satisfied" and "if the inspector believes". These devices may be just as effective to limit the authority of the courts to control the exercise of the power conferred as would clear, direct language.

Matters dealt with elsewhere in this Report forcibly illustrate the absence in the past, and the need in the future, of organized and purposeful legislative supervision in this Province. For example, in approximately twenty-five different statutes, all the powers of a Supreme Court judge in civil cases "to enforce the attendance of any person and to compel him to give evidence and produce documents and things", (or powers expressed in substantially similar language), are conferred on lay bodies and persons, in some cases on mere inspectors and minor officials. These powers include the power to commit to jail for failing to comply with the orders issued or made by the body or individual. The power to commit to jail for contempt has been conferred on an inspector under the Fire Marshals Act;<sup>6</sup> on any person appointed by the Minister to conduct an inquiry under the Mining Act;<sup>7</sup> on one or more persons appointed by the Lieutenant Gover-

<sup>6</sup>R.S.O. 1960, c. 148, s. 13.

<sup>7</sup>R.S.O. 1960, c. 241, s. 619, as enacted by Ont. 1961-62, c. 81, s. 1.





nor in Council under the Private Sanitaria Act;<sup>8</sup> and on the Workmen's Compensation Board and any member of the Board, or any other person appointed to make an inquiry that it deems necessary.<sup>9</sup>

Powers of investigation have been conferred on boards with reckless abandon, without any statutory safeguards as to non-disclosure of the information obtained to unauthorized persons. There are at least eighty statutes which confer such powers, and in very few is there any restriction on the use of the information gained.<sup>10</sup> There has been a growing indifference to the delegation of legislative authority to the Lieutenant Governor in Council and other bodies. Repeatedly, power is given to the Lieutenant Governor in Council to make regulations "respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act or any part thereof". It is a power that is rarely necessary, but it appears with great frequency. In the Conservation Authorities Act, the conservation authority, an appointed body, is given authority to make regulations with the approval of the Lieutenant Governor in Council, to create offences and provide for penalties.<sup>11</sup>

In the debates during the session of the Legislature in the year 1964, some interest was shown with respect to safeguarding the rights of individuals, but the same Legislature passed the Apprenticeship and Tradesmen's Qualification Act, conferring powers on the Lieutenant Governor in Council to make regulations "defining any expression used in this Act".<sup>12</sup> This amendment provokes the comment that the Legislature was not sure what was meant by the language of the Act, so it divested itself of the responsibility of expressing itself clearly by leaving that matter, not to the courts, but to the Lieutenant Governor in Council. This is an abandonment of legislative responsibility.

We emphasize and make it clear that anything we have said in this Report is not to be taken as a criticism of any Attorney

<sup>8</sup>R.S.O. 1960, c. 307, s. 36.

<sup>9</sup>R.S.O. 1960, c. 437, ss. 65, 75.

<sup>10</sup>These matters are discussed fully in Part I, Section 4 *supra*.

<sup>11</sup>R.S.O. 1960, c. 62, s. 20, as amended by Ont. 1962-63, c. 20, s. 4; and s. 20a, as enacted by Ont. 1960-61, c. 10, s. 1.

<sup>12</sup>Ont. 1964, c. 3, s. 18.



General, or of any legislative counsel, or any member of the Attorney General's staff. This Province has been particularly fortunate in having highly skilled and competent law officers in the Department of the Attorney General. However, our studies clearly indicate that the Attorney General and his staff have never been provided with a proper system under which the responsibility for the supervision of legislation has been properly defined.

If unjustified encroachment on civil rights by the Legislature is to be avoided, a new system of supervision should be developed which will operate in co-operation with the departments of government. The primary responsibility for proposing new legislation rests with the department charged with the social programme to be undertaken. It should first frame the policy that it proposes for the new legislation, which should then be submitted to the Cabinet. If the proposals are approved, preparation of the proposed legislation should be undertaken by draftsmen in the Attorney General's Department. They should take their instructions on the substantive policy of the legislation from the department or the minister concerned, but they should be responsible to the Attorney General for the legal provisions made to carry out that policy. Any major difficulties should be resolved by consultation between the Attorney General and the minister of the department concerned. At the present time draftsmen in the Attorney General's department, although expert and aware of many problems, have no independent responsibility for the content of statutory provisions. At most they may advise or warn, but they may be overruled.

In addition to his supervision of all future legislation, the Attorney General should be charged with the task of revising all legislation now in effect, so that the principles and safeguards recommended in this Report will be applied to past legislation as well as to future legislation. This will be a considerable task, but its size only emphasizes its importance.



AN ADDRESS

BY

THE HONOURABLE R. ROY McMURTRY, Q.C.

ON

THE OFFICE OF THE ATTORNEY GENERAL FOR ONTARIO

BARBADOS

JANUARY 1978



MAY I BEGIN BY THANKING YOU FOR THE WELCOME AND THE HOSPITALITY WHICH HAS BEEN ACCORDED ME SINCE MY ARRIVAL IN THIS VERY BEAUTIFUL COUNTRY OF YOURS. YOUR CITIZENS HAVE RECEIVED ME WITH A WARMTH AND OPENNESS WHICH WILL LONG REMAIN IN MY MEMORY. I WILL TAKE BACK HOME WITH ME A REAL FEELING OF ENTHUSIASM FOR YOUR COUNTRY AND ITS PEOPLE TOGETHER WITH A COMMITMENT TO STRENGTHEN THE TIES WHICH EXIST BETWEEN YOUR FELLOW COUNTRYMEN AND THE PEOPLE OF ONTARIO.

MY TOPIC TODAY IS THE ROLE OF THE OFFICE OF ATTORNEY GENERAL FOR ONTARIO.

IT IS OF COURSE A SUBJECT VERY CLOSE TO MY HEART, AS I HAVE HAD THE PRIVILEGE OF SERVING IN THAT OFFICE NOW FOR OVER TWO YEARS. EVERY DAY OF THAT TIME HAS BROUGHT TASKS AND CHALLENGES WHICH HAVE CAUSED ME TO REFLECT A GOOD DEAL ON THE ROLE OF THE ATTORNEY GENERAL AND UPON THE DUTIES AND RESPONSIBILITIES WHICH BY THE LAW AND CUSTOM OF OUR CONSTITUTION HAVE COME TO DEVOLVE UPON THAT OFFICE, WHICH I AM FORTUNATE ENOUGH NOW TO HOLD. I HAVE CHOSEN THIS TOPIC WITH THE HOPE THAT I MIGHT IN SOME SMALL WAY CONTRIBUTE TO THE CONTINUING AND ESSENTIAL DIALOGUE THROUGHOUT THE COMMONWEALTH AS TO THE NATURE OF THE OFFICE AND THE MACHINERY BY WHICH IT CONTRIBUTES TO OUR PRICELESS HERITAGE OF ORDERED LIBERTY UNDER LAW.





THE ROLE OF THE ATTORNEY GENERAL AND THE VERY NATURE OF THE OFFICE HAVE TAKEN SOMEWHAT DIFFERENT FORMS EVEN IN THOSE COUNTRIES WHICH SHARE TO ONE DEGREE OR ANOTHER THE ENGLISH LEGAL TRADITION. A NUMBER OF DIFFERENT MODELS OF THE OFFICE HAVE EMERGED WITHIN THE COMMONWEALTH. WHEN THE COMMONWEALTH LAW MINISTERS MET IN WINNIPEG, CANADA, LAST AUGUST, THEY HAD BEFORE THEM A DISCUSSION PAPER ON EMERGING PROBLEMS IN DEFINING THE MODERN ROLE OF THE OFFICE OF ATTORNEY GENERAL IN COMMONWEALTH COUNTRIES. PROFESSOR EDWARDS, THE DISTINGUISHED SCHOLAR WHO PREPARED THE PAPER, REVIEWED A NUMBER OF EXISTING SYSTEMS WHICH PRESENTLY OPERATE THROUGHOUT THE COMMONWEALTH. HE ANALYZED THE CUSTOMS AND MACHINERY WHICH HAD DEVELOPED IN EACH COUNTRY TO SECURE THE ESSENTIAL INGREDIENTS OF INDEPENDENCE AND ACCOUNTABILITY WHICH ARE SO CENTRAL TO THE ROLE OF ANY MODERN ATTORNEY GENERAL. HE POINTED OUT THAT THE OFFICE HAS TAKEN ON A GOOD DEAL OF INDIVIDUAL CHARACTER ACCORDING TO LOCAL CONDITIONS AND THAT THERE OPERATES NOW THROUGHOUT THE COMMONWEALTH WHAT HE DESCRIBES AS "A SOMEWHAT BEWILDERING SERIES OF ALTERNATIVE ARRANGEMENTS" WHICH RELATE TO THAT OFFICE. IN MY ADDRESS TO YOU NOW I WOULD LIKE TO PLACE BEFORE YOU MY OWN VIEW OF THE GREAT CENTRAL PRINCIPLES WHICH SUSTAIN THE OFFICE OF ATTORNEY GENERAL, AS THAT OFFICE HAS



DEVELOPED IN THE PROVINCE OF ONTARIO, WITH SPECIFIC REFERENCE TO THE HISTORICAL DEVELOPMENT OF THE OFFICE AND THE PRACTICAL MACHINERY FOR THE DAILY APPLICATION OF ITS CENTRAL PRINCIPLES.

IT IS NOT NECESSARY TO TRACE THE COMMON-LAW HISTORY OF THE OFFICE BACK TO THE 13TH CENTURY IN ENGLAND. IT IS ENOUGH TO POINT OUT THAT IN THAT PART OF BRITISH NORTH AMERICA WHICH IS NOW ONTARIO THE OFFICE HAS EXISTED SINCE THE 18TH CENTURY. ONTARIO IS DIFFERENT FROM MANY JURISDICTIONS IN THE SENSE THAT THE ATTORNEY GENERAL HAS FOR OVER 125 YEARS BEEN THE HOLDER OF POLITICAL OFFICE AND A FULL MEMBER OF THE CABINET. THE VIEW WHICH HAS PREVAILED IS THAT IT IS ESSENTIAL FOR THE ATTORNEY GENERAL TO BE A MEMBER OF THE CABINET AS LONG AS HE BEARS ADMINISTRATIVE RESPONSIBILITY AS THE HEAD OF A DEPARTMENT OF GOVERNMENT. HAVING SUPERVISION OF THE MACHINERY OF JUSTICE HE MUST AS A MINISTER TO THE CROWN BE POLITICALLY ACCOUNTABLE TO THE LEGISLATIVE ASSEMBLY. THUS, IN ONTARIO THE POLITICALLY ACCOUNTABLE NATURE OF THE ATTORNEY GENERAL'S OFFICE HAS ALWAYS BEEN ONE OF ITS ESSENTIAL CHARACTERISTICS.



IT IS IMPORTANT IN THIS CONTEXT TO EXPLORE THE MEANING OF THE WORD "POLITICAL". THE HISTORIC INDEPENDENCE OF THE OFFICE OF ATTORNEY GENERAL IS TRADITIONALLY COINED IN TERMS OF INDEPENDENCE FROM POLITICAL CONSIDERATIONS, PARTICULARLY IN RELATION TO THE INITIATION AND CONDUCT OF CRIMINAL PROCEEDINGS. THE HONOURABLE JAMES McRUER, ONE OF OUR MOST ILLUSTRIOUS JURISTS, IN HIS ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS SAID THAT THE ATTORNEY GENERAL

"...MUST OF NECESSITY OCCUPY A DIFFERENT POSITION POLITICALLY FROM ALL OTHER MINISTERS OF THE CROWN. AS A QUEEN'S ATTORNEY, HE OCCUPIES AN OFFICE WITH JUDICIAL ATTRIBUTES AND IN THAT OFFICE HE IS RESPONSIBLE TO THE QUEEN AND NOT RESPONSIBLE TO THE GOVERNMENT. HE MUST DECIDE WHEN TO PROSECUTE AND WHEN TO DISCONTINUE A PROSECUTION. IN MAKING SUCH DECISIONS HE IS NOT UNDER THE JURISDICTION OF THE CABINET NOR SHOULD SUCH DECISIONS BE INFLUENCED BY POLITICAL CONSIDERATIONS. THEY ARE DECISIONS MADE AS THE QUEEN'S ATTORNEY, NOT AS A MEMBER OF THE GOVERNMENT OF THE DAY."

I THINK WE MUST REALIZE THAT THE WORD "POLITICAL" HAS A NUMBER OF MEANINGS DEPENDING ON THE CIRCUMSTANCES IN WHICH IT IS USED. WITH RESPECT TO THE OFFICE OF ATTORNEY GENERAL, INDEPENDENCE FROM POLITICS MEANS INDEPENDENCE FROM ANY PARTISAN POLITICAL CONSIDERATION. IT MEANS



INDEPENDENCE FROM ANY CONSIDERATION OF THE FORTUNES OF ONE'S OWN POLITICAL PARTY. I HAPPEN TO BE A MEMBER OF THE PROGRESSIVE CONSERVATIVE PARTY OF ONTARIO WHICH CONSTITUTES THE GOVERNMENT OF THE DAY IN ONTARIO. WHILE I AM DEEPLY COMMITTED TO THE PRINCIPLES WHICH ARE REPRESENTED AND CARRIED FORTH BY THAT PARTY, THE POLITICAL FORTUNES OF MY PARTY ARE SIMPLY NOT A FACTOR IN ANY OF THE DECISIONS WHICH I MAKE WITH RESPECT TO THE INITIATION AND CONDUCT OF CRIMINAL MATTERS OR ANY OF THE OTHER QUASI-JUDICIAL FUNCTIONS OF MY OFFICE.

EDWARD BATES, ABRAHAM LINCOLN'S ATTORNEY GENERAL - AND A MAN WHO HAD BEEN A POLITICIAN, A CONGRESSMAN, AND HIMSELF A CANDIDATE FOR THE PRESIDENCY OF THE UNITED STATES - EXPRESSED THIS VIEW ON THE OFFICE OF THE ATTORNEY GENERAL, AS FOLLOWS:

"THE OFFICE I HOLD IS NOT PROPERLY POLITICAL, BUT STRICTLY LEGAL; AND IT IS MY DUTY, ABOVE ALL OTHER MINISTERS OF STATE, TO UPHOLD THE LAW AND TO RESIST ALL ENCROACHMENTS FROM WHATEVER QUARTER, OR MERE WILL AND POWER."





THERE IS, HOWEVER, ANOTHER MEANING OF THE WORD "POLITICAL". THAT OTHER MEANING RELATES TO THE PRINCIPLE ENUNCIATED BY PROFESSOR EDWARDS IN HIS DISCUSSION PAPER WHEN HE INDICATED THAT THE PRINCIPLE OF POLITICAL INDEPENDENCE DOES NOT MEAN THAT THE ATTORNEY GENERAL MUST DISCHARGE HIS MANY RESPONSIBILITIES FROM AN IVORY TOWER. IT IS THE DUTY OF THE ATTORNEY GENERAL TO CONSIDER WIDE ISSUES INCLUDING QUESTIONS OF THE GENERAL PUBLIC INTEREST. THE DECISION OF ANY ATTORNEY GENERAL MAY BE POLITICAL IN THE SENSE THAT IT MAY INVOLVE A JUDGEMENT AS TO WHETHER OR NOT A PARTICULAR PROSECUTION WOULD SERVE THE GENERAL PUBLIC INTEREST IN THE BROADEST SENSE.

PERHAPS YOU WILL PERMIT ME THE INDULGENCE OF A MODERATELY LENGTHY QUOTATION FROM PROFESSOR EDWARDS' PAPER WHICH SUMS UP VERY WELL THE KINDS OF POLITICAL CONSIDERATIONS AN ATTORNEY GENERAL MAY MAKE:

"... THE MAINTENANCE OF HARMONIOUS INTERNATIONAL RELATIONS BETWEEN STATES, THE REDUCTION OF STRIFE BETWEEN ETHNIC GROUPS, THE MAINTENANCE OF INDUSTRIAL PEACE, AND GENERALLY THE INTERESTS OF THE PUBLIC AT LARGE ARE LEGITIMATE POLITICAL CONSIDERATIONS IN DECIDING WHETHER (OR WHEN) TO INITIATE CRIMINAL PROCEEDINGS AND, AN EVEN MORE SENSITIVE QUESTION, WHETHER (OR WHEN) TO DISCONTINUE A CRIMINAL PROSECUTION. ALL THESE BROAD POLITICAL CONSIDERATIONS, WHETHER DOMESTIC OR INTERNATIONAL IN



CHARACTER, MUST BE SEEN TO INVOLVE THE WIDER PUBLIC INTEREST THAT BENEFITS THE POPULATION AT LARGE RATHER THAN ANY SINGLE POLITICAL GROUP OR FACTIONAL INTEREST. AS I UNDERSTOOD THE TERM IN THE PRESENT DISCUSSION, PARTISAN POLITICS HAS A MUCH NARROWER FOCUS AND IS DESIGNED TO PROTECT OR ADVANCE THE RETENTION OF CONSTITUTIONAL POWER BY THE INCUMBENT GOVERNMENT AND ITS POLITICAL SUPPORTERS. IT IS THE INTERVENTION OF POLITICAL CONSIDERATIONS IN THIS LATTER SENSE OF PARTISAN POLITICS THAT SHOULD HAVE NO PLACE IN THE MAKING OF PROSECUTORIAL DECISIONS BY DIRECTORS OF PUBLIC PROSECUTIONS OR ATTORNEYS GENERAL."

WHILE SOME MEMBERS OF THE COMMONWEALTH HAVE FOUND IT APPROPRIATE TO INSULATE THE CONDUCT OF CRIMINAL PROSECUTIONS FROM THE SUPERINTENDANCE OF A POLITICALLY ACCOUNTABLE MINISTER OF THE CROWN, OTHER MEMBERS HAVE NOT ADOPTED THIS MEASURE. IN ANY EVENT, THE TOPIC CAN BE LEFT WITH THE SECURE KNOWLEDGE THAT, NO MATTER WHICH FORM OF MACHINERY HAS PROVEN TO BE THE BEST FOR ANY SINGLE MEMBER OF THE COMMONWEALTH, THE UNDERLYING PRINCIPLES REMAIN THE SAME. IF I MAY AGAIN ADOPT THE WORDS OF PROFESSOR EDWARDS:



"THE EXPERIENCE OF BOTH THE OLDER AND NEWER MEMBERS OF THE COMMONWEALTH CONFIRMS MY DEEP SEATED CONVICTION THAT, NO MATTER HOW ENTRENCHED CONSTITUTIONAL SAFEGUARDS MAY BE, IN THE FINAL ANALYSIS IT IS THE STRENGTH OF CHARACTER AND PERSONAL INTEGRITY OF THE HOLDER OF THE OFFICES OF ATTORNEY GENERAL (OR SOLICITOR GENERAL IN SOME COUNTRIES) AND THAT OF THE DIRECTOR OF PUBLIC PROSECUTIONS WHICH IS OF PARAMOUNT IMPORTANCE. FURTHERMORE, SUCH QUALITIES ARE BY NO MEANS ASSOCIATED EXCLUSIVELY WITH EITHER THE POLITICAL OR NON-POLITICAL NATURE OF THE OFFICE OF THE ATTORNEY GENERAL."

IN ONTARIO THE ATTORNEY GENERAL IS GIVEN A CURIOUSLY WIDE RANGE OF POWERS, CERTAINLY WIDER THAN IN MOST OTHER PROVINCE OF CANADA AND PERHAPS WIDER THAN IN MOST OF THE COMMONWEALTH INCLUDING BRITAIN. THE OFFICE IS SPECIFICALLY RECOGNIZED IN THE BRITISH NORTH AMERICA ACT, OUR BASIC CONSTITUTIONAL DOCUMENT. A NUMBER OF THE DUTIES OF THE OFFICE HAVE BEEN COLLECTED AND SET OUT SPECIFICALLY BY ONTARIO STATUTE WHICH RECOGNIZES AND CATALOGUES, WITHOUT IN ANY WAY RESTRICTING, THE INHERENT QUALITIES OF THE OFFICE. FOR EXAMPLE THE ONTARIO MINISTRY OF THE ATTORNEY GENERAL ACT PROVIDES THAT THE ATTORNEY GENERAL:

- gov't senior lawyer*
- (A) IS THE LAW OFFICER OF THE EXECUTIVE COUNCIL;
  - (B) SHALL SEE THAT THE ADMINISTRATION OF PUBLIC AFFAIRS IS IN ACCORDANCE WITH THE LAW;
  - (C) SHALL SUPERINTEND ALL MATTERS CONNECTED WITH THE ADMINISTRATION OF JUSTICE IN ONTARIO;
  - (D) SHALL PERFORM THE DUTIES AND HAVE THE POWERS THAT BELONG TO THE ATTORNEY GENERAL AND



*AG. ref. public prosecutor*  
*to*

SOLICITOR-GENERAL OF ENGLAND BY LAW OR USAGE,  
SO FAR AS THOSE DUTIES AND POWERS ARE  
APPLICABLE TO ONTARIO;

- (E) SHALL ADVISE THE GOVERNMENT AND SUPERINTEND  
UPON ALL MATTERS OF A LEGISLATIVE NATURE;
- (F) SHALL ADVISE THE HEADS OF THE DEPARTMENTS  
AND AGENCIES OF GOVERNMENT IN THEIR LEGAL  
MATTERS ;

AND

- (G) SHALL CONDUCT AND REGULATE ALL LITIGATION  
FOR AND AGAINST THE CROWN.

IT WOULD IMPOSE AN UNDUE STRAIN ON YOUR PATIENCE TO OUTLINE  
AND CATALOGUE EVERYTHING THAT IS INVOLVED IN THE DISCHARGE  
OF THESE DUTIES, OR EVEN TO DESCRIBE BRIEFLY THE MACHINERY  
AND THE CUSTOMS WHICH HAVE OVER THE YEARS EVOLVED TO SERVE  
THE OFFICE OF ATTORNEY GENERAL FOR ONTARIO. IT WOULD ALSO  
TAKE A SEPARATE ADDRESS IN ITSELF TO OUTLINE THE  
DIVISION OF POWERS BETWEEN THE FEDERAL MINISTER OF JUSTICE  
FOR CANADA, WHO HAS LEGISLATIVE AUTHORITY WITH RESPECT TO  
THE SUBSTANTIVE AREAS OF CRIMINAL LAW AND PROCEDURE  
AND WHO ASSERTS SOME INDEPENDENT RIGHT TO PROSECUTE IN  
CERTAIN CLASSES OF OFFENCES, AND THE PROVINCIAL ATTORNEYS  
GENERAL OF THE TEN PROVINCES OF CANADA WHO HAVE PARAMOUNT  
RESPONSIBILITY TO SUPERINTEND ALL ASPECTS OF THE  
ADMINISTRATION OF JUSTICE.





WITHOUT ANY FURTHER EXPLORATION OF THOSE SUBJECTS, I SHALL ATTEMPT TO TOUCH UPON THOSE ASPECTS OF THE OFFICE OF ATTORNEY GENERAL FOR ONTARIO WHICH SEEM TO HAVE THE MOST DIRECT RELEVANCE TO THE DEVELOPMENT OF A CONTINUING DIALOGUE THROUGHOUT THE COMMONWEALTH ABOUT THE NATURE OF THE OFFICE OF ATTORNEY GENERAL.

TO SOME EXTENT THE DUTIES OF THE OFFICE OF ATTORNEY GENERAL MAKE IT A LONELY JOB. THE LAW AND THE CONSTITUTION <sup>impose?</sup> OPPOSE UPON EVERY ATTORNEY GENERAL A NUMBER OF DUTIES WHICH SIMPLY CANNOT BE DELEGATED TO ANYONE. IT IS ONLY IN A LIMITED SENSE THAT THEY CAN EVEN BE SHARED WITH ANYONE. ALTHOUGH ONE MAY SEEK AND RECEIVE EXCELLENT ADVICE FROM THE VERY DEDICATED PROFESSIONAL CROWN LAW OFFICERS WHO STAFF THE MINISTRY OF THE ATTORNEY GENERAL, THE ACTUAL DECISIONS IN IMPORTANT MATTERS MUST BE MADE BY THE ATTORNEY GENERAL PERSONALLY BECAUSE THE ACCOUNTABILITY FOR THOSE DECISIONS REST WITH THE ATTORNEY GENERAL AND NOT WITH HIS CROWN LAW OFFICERS.

IN SOME WAYS, HOWEVER, AN ATTORNEY GENERAL IS MORE FORTUNATE THAN THE OTHER MINISTERS BECAUSE HE IS A SERVANT OF THE LAW AND THERE IS SIMPLY NO INTEREST OR PRINCIPLE WHICH CAN BE WEIGHED AGAINST THAT PARAMOUNT DUTY OF FIDELITY TO THE LAW. BY THE NATURE OF HIS OFFICE AN ATTORNEY GENERAL



IS RELIEVED OF THE BURDEN OF DECISIONS MADE BY OTHER POLITICIANS WHICH CONSTANTLY INVOLVE THE CAREFUL WEIGHING AND BALANCING OF DIFFERENT FORCES IN THE CALCULUS OF SOCIAL BENEFIT.

IN DETERMINING THE INTERESTS OF JUSTICE, IN SEEKING TO UNRAVEL AND APPLY THE CORRECT LEGAL PRINCIPLES TO EVERY ONE OF THE MYRIAD LEGAL DECISIONS ANY ATTORNEY GENERAL IS DAILY REQUIRED TO MAKE, I DERIVE GREAT HELP FROM THE SERVICES OF MY PERMANENT PROFESSIONAL LEGAL ADVISERS.

I AM EXTREMELY FORTUNATE IN THE STRENGTH AND QUALITY OF MY LEGAL ADVISERS. THERE HAS IN RECENT YEARS DEVELOPED IN ONTARIO WITHIN MY MINISTRY A GROUP OF DEDICATED MEN AND WOMEN, LEARNED IN THE LAW, POLITICALLY NON PARTISAN, WHO SERVE WITH GREAT DISTINCTION THE INTERESTS OF THE ADMINISTRATION OF JUSTICE.

AT PRESENT THE CROWN LAW OFFICE CONSISTS OF A CIVIL LITIGATION AND LEGAL ADVISORY SERVICES BRANCH, WITH ABOUT 17 STAFF LAWYERS; A CONSTITUTIONAL LAW DIVISION, WITH 4 STAFF LAWYERS, AND A CRIMINAL APPEALS AND SPECIAL PROSECUTIONS BRANCH, WITH APPROXIMATELY 20 LAWYERS.



THE GREAT BULK OF ALL CRIMINAL PROSECUTIONS ARE CARRIED OUT BY THE CROWN ATTORNEY'S OFFICE, ACTING AS AGENT OF THE ATTORNEY GENERAL, IN EACH OF OUR 48 COUNTIES AND DISTRICTS. THE NUMBER OF LAWYERS EMPLOYED IN THIS SYSTEM IS JUST UNDER 200. THE WORK OF THE CROWN ATTORNEYS IS CO-ORDINATED THROUGH A NETWORK OF NINE REGIONAL CROWN ATTORNEYS, REPORTING TO THE DIRECTOR OF CROWN ATTORNEYS IN THE HEAD OFFICE OF THE MINISTRY.

THE INDEPENDENCE AND INTEGRITY OF THE PERMANENT LEGAL STAFF IS CENTRAL TO PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE. THE SLIGHTEST BASIS FOR ANY PUBLIC PERCEPTION OF A POLITICALLY PARTISAN CLIMATE WITHIN AN ATTORNEY GENERAL'S MINISTRY WOULD VIRTUALLY CRIPPLE THAT OFFICE. AS THEODORE ROOSEVELT WROTE TO HIS ATTORNEY GENERAL IN 1904:

"OF ALL THE OFFICERS OF THE GOVERNMENT, THOSE OF THE DEPARTMENT OF JUSTICE SHOULD BE KEPT MOST FREE FROM ANY SUSPICION OF IMPROPER ACTION OR PARTISAN OR FACTIONAL GROUNDS."

ALTHOUGH IT MIGHT BE DIFFICULT TO FIND A BASIS IN AUTHORITY FOR ANY PROPOSITION THAT THE ATTORNEY GENERAL IS BY LAW OBLIGED TO SEEK THE ADVICE OF HIS LAW OFFICERS UNDER CERTAIN CIRCUMSTANCES, I THINK THAT ANY HOLDER OF THE OFFICE WITH ANY SENSE OF HIS TRADITIONAL RESPONSIBILITIES



WOULD MAKE EVERY EFFORT TO ENSURE THAT APPROPRIATE CONSULTATIONS TOOK PLACE AND APPROPRIATE ADVICE WAS SOUGHT IN ALL CASES WHERE THE CIRCUMSTANCES REQUIRED IT. FOR ONE THING THE QUALITY OF THE ATTORNEY GENERAL'S DECISIONS IS OBVIOUSLY GOING TO BE BETTER IF THAT DECISION IS ILLUMINED BY THE ANALYSIS OF SEASONED AND EXPERIENCED LEGAL MINDS. THE PROCESS OF CONSULTATION AND ADVICE INTRODUCES THE SAFEGUARD OF ENSURING THAT ALL RELEVANT FACTS HAVE BEEN LOOKED INTO AND ALL RELEVANT LEGAL PRINCIPLES HAVE BEEN ADDRESSED AND PROPERLY APPLIED.

I HAVE HAD OCCASIONS RECENTLY, AFTER SEEKING THE OPINION OF SOME OF MY SENIOR PERMANENT CROWN LAW OFFICERS, TO TABLE IN THE LEGISLATIVE ASSEMBLY THE WRITTEN OPINION WHICH HAS BEEN RENDERED TO ME BY MY SENIOR LEGAL ADVISORS. THE PARTICULAR OPINIONS WHICH I DID TABLE IN THE HOUSE RELATED TO THE ANALYSIS OF THE FACTUAL AND LEGAL REASONS WHICH HAD LED MY STAFF, AND MYSELF AS WELL, TO CONCLUDE THAT THERE WAS NO PROPER BASIS FOR THE INITIATION OF CRIMINAL PROCEEDINGS IN RESPECT OF SOME CONDUCT BY A NUMBER OF INDIVIDUALS, WHICH CONDUCT HAD BEEN CHARACTERIZED IN THE PRESS AND IN CERTAIN POLITICAL QUARTERS AS A MATTER WHICH DESERVED INVESTIGATION WITH A VIEW TO SAYING WHETHER A PROSECUTION WOULD LIE.

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IN SOME WAYS MY DECISION TO TABLE IN THE ASSEMBLY THE ACTUAL WRITTEN OPINION OF MY CROWN LAW OFFICER INVOLVED AN ELEMENT OF INNOVATION. ALTHOUGH THERE HAVE BEEN OCCASIONS IN THE PAST WHERE AN ATTORNEY GENERAL HAS FILED AN ACTUAL OPINION PRODUCED BY ONE OF HIS CROWN LAW OFFICERS, IT HAS BEEN SOMEWHAT MORE TRADITIONAL IN MY JURISDICTION FOR AN ATTORNEY GENERAL SIMPLY TO ANNOUNCE THAT HE HAD LOOKED INTO THE MATTER AND HAD DECIDED UNDER THE CIRCUMSTANCES THAT NO PROSECUTION SHOULD BE BROUGHT. PROFESSOR EDWARDS IN HIS BOOK THE LAW OFFICERS OF THE CROWN ANALYZES WITH SOME CARE THE QUESTION OF THE DESIRABILITY OF DISCLOSING THE REASONS FOR DECIDING NOT TO INSTITUTE CRIMINAL PROCEEDINGS AND AFTER REVIEWING A MASS OF HISTORICAL MATERIAL CONCLUDES THAT THE BETTER CONSTITUTIONAL CONVENTION IS THAT, ALTHOUGH DISCLOSURE IS STILL NOT VERY USUAL, THERE ARE CIRCUMSTANCES UNDER WHICH SUCH DISCLOSURE IS MOST PROPER.

IT SEEMS TO ME THAT THERE DO ARISE OCCASIONS WHEN THE MEMBERS OF THE LEGISLATIVE ASSEMBLY AND THE MEMBERS OF THE PUBLIC ARE ENTITLED TO SOMETHING MORE THAN A BALD STATEMENT THAT THE MATTER HAS BEEN LOOKED INTO. I THINK THERE ARE OCCASIONS WHEN THE PUBLIC ARE ENTITLED TO KNOW THE LEGAL AND FACTUAL BASIS UPON WHICH DECISIONS HAVE BEEN MADE. TO SUBJECT THE BASIS OF A DECISION TO PUBLIC SCRUTINY IS IN NO WAY TO DIMINISH THE FUNCTION OF



THE MINISTER MAKING THAT DECISION AND TAKING RESPONSIBILITY FOR IT. I SEE NO MERIT IN THE PROPOSITION THAT AN ATTORNEY GENERAL SHOULD SO <sup>SURELY</sup> SHROUD HIS DECISIONS IN MYSTERY THAT THE PUBLIC IS INVARIABLY DENIED THE SATISFACTION OF SEEING THAT DECISIONS ARE WELL AND TRULY GROUNDED IN FACT AND IN LAW. IN ONE SENSE THIS IS SIMPLY ANOTHER APPLICATION OF THE FUNDAMENTAL PRINCIPLES SO APTLY STATED BY EDMUND BURKE WHEN HE SAID

"WHERE MYSTERY BEGINS, JUSTICE ENDS."

THIS IS OF COURSE NOT TO SAY THAT THE MINISTERIAL DECISION MAKING MUST BE CONDUCTED IN THE FULL GLARE OF PUBLICITY OR THE DOCTRINE OF CROWN PRIVILEGE WITH RESPECT TO THE ADVICE GIVEN TO MINISTERS OF THE CROWN HAS OUTLIVED ITS USEFULNESS. IT IS SIMPLY TO SAY THAT PUBLIC CONFIDENCE IS THE BEDROCK OF THE ATTORNEY GENERAL'S OFFICE. VIRTUALLY ALL OTHER CONSIDERATIONS MUST YIELD TO THIS PARAMOUNT PRINCIPLE. I THINK THAT IN SOME CASES A WIDER DEGREE OF OPENNESS ABOUT THE MANNER IN WHICH THE ATTORNEYS GENERAL EXERCISE THEIR FUNCTIONS WOULD STRENGTHEN PUBLIC CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THAT OFFICE. IT ALL COMES DOWN IN THE END TO THE PRINCIPLE ENUNCIATED BY PROFESSOR EDWARDS IN HIS BOOK



..... IN SUITABLE CASES SUFFICIENT REASONS  
WOULD BE GIVEN TO CONVINCE THE HOUSE OF COMMONS  
THAT THE LAW OFFICER HAS CONSIDERED ALL THE  
RELEVANT FACTORS AND HAS REACHED HIS DECISION  
WITH THAT IMPARTIALITY OF JUDGMENT WHICH IS  
THE ULTIMATE STRENGTH AND PROTECTION OF THE  
CONSTITUTIONAL INDEPENDENCE OF THE LAW OFFICERS  
OF THE CROWN.

WHEN SPEAKING OF POLITICAL ACCOUNTABILITY OF THE  
ATTORNEY GENERAL ONE CANNOT FAIL TO MENTION RECENT  
DEVELOPMENTS IN ENGLAND.

AT THE END OF JULY LAST YEAR (1977), THE JUDICIAL  
COMMITTEE OF THE HOUSE OF LORDS, THE HIGHEST  
BRITISH APPEAL COURT, GAVE JUDGMENT IN THE CASE OF  
GOURIET V. THE UNION OF POST OFFICE WORKERS. THE  
CASE CONCERNED A PRIVATE CITIZEN WHO SOUGHT AN INJUNCTION  
AGAINST A POSTAL UNION BECAUSE OF ITS INTENDED BAN ON  
THE HANDLING OF MAIL TO SOUTH AFRICA. THE SIGNIFICANT  
PART OF THE CASE IS THAT THE BRITISH ATTORNEY GENERAL  
HAD REFUSED TO CONSENT TO THE ACTION. THE COURT HAD TO  
FACE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER  
OR NOT THE COURTS CAN COMPEL THE ATTORNEY GENERAL TO GIVE  
REASONS FOR EXERCISING HIS DISCRETIONARY POWERS, WITH A  
VIEW TO DETERMINING WHETHER THE COURT SHOULD OVERRIDE  
THE ATTORNEY GENERAL'S DECISION IN PARTICULAR CASES.



THE HOUSE OF LORDS' DECISION WAS UNANIMOUS, SWEEPING AND VERY SIGNIFICANT. THEY SAID, IN EFFECT, THAT THE PRIVATE CITIZEN CANNOT UNDER ANY CIRCUMSTANCES, INVOKE THE AID OF THE CIVIL COURTS TO PREVENT A THREATENED BREACH OF THE CRIMINAL LAW, OTHER THAN TO PROTECT HIS PERSONAL RIGHTS. IF THE CRIMINAL LAW IS ACTUALLY BREACHED, EVERY CITIZEN RETAINS THE RESIDUAL CONSTITUTIONAL RIGHT TO BRING A PRIVATE PROSECUTION AGAINST THE OFFENDER. BUT THE ATTORNEY GENERAL IS THE ONLY PERSON RECOGNIZED BY THE PUBLIC LAW AS BEING ENTITLED TO REPRESENT THE PUBLIC INTEREST IN A COURT OF JUSTICE; THE CIVIL COURTS MAY DECLARE PUBLIC RIGHTS ONLY AT HIS INSISTENCE. PUBLIC RIGHTS ARE CONSTITUTIONALLY VESTED IN THE CROWN, AND THE ATTORNEY GENERAL ENFORCES THEM AS CHIEF LAW OFFICER OF THE CROWN.

THOSE ARE VERY SWEEPING STATEMENTS, BUT I THINK THEY ARE JUSTIFIED WHEN ONE EXAMINES THE ROLE OF THE ATTORNEY GENERAL IN MAINTAINING THE DELICATE RELATIONSHIP BETWEEN THE EXECUTIVE, LEGISLATURE AND JUDICIARY.

THE DISGRUNTLED CITIZEN WHO LAUNCHED THE ACTION IN THE GOURIET CASE IS REPORTED TO HAVE COMMENTED AS FOLLOWS: "IT NOW SEEMS THAT LAW IS NO LONGER ABOVE THE ATTORNEY GENERAL. RECOLLECTING THE POWERFUL WORDS OF THOMAS FULLER 300 YEARS AGO, 'BE YOU EVER SO HIGH, THE LAW IS ABOVE YOU'; THE ATTORNEY GENERAL HAS NOW, BY





THIS JUDGMENT, BEEN CONFIRMED AS BEING UNANSWERABLE TO THE COURTS AND HAS TAKEN UPON HIMSELF A CERTAIN DIVINITY."

BUT LORD FRASER, IN HIS JUDGMENT, POINTED OUT THAT THE STATEMENT JUST REFERRED TO DOES, INDEED, MISCONCEIVE THE ATTORNEY GENERAL'S ROLE. LORD FRASER SAID:

"IF THE ATTORNEY GENERAL WERE TO COMMIT A SERIOUS ERROR OF JUDGMENT IN THE EXERCISE OF HIS INHERENT POWERS AND DUTIES, THE REMEDY MUST LIE IN THE POLITICAL FIELD BY ENFORCING HIS RESPONSIBILITY TO PARLIAMENT AND NOT IN THE LEGAL FIELD THROUGH THE COURTS. THAT IS APPROPRIATE BECAUSE HIS ERROR WOULD NOT BE AN ERROR IN LAW, BUT WOULD BE ONE OF POLITICAL JUDGMENT; USING THE EXPRESSION, OF COURSE, NOT IN A PARTY SENSE - BUT IN A SENSE OF WEIGHING THE RELATIVE IMPORTANCE OF DIFFERENT ASPECTS OF THE PUBLIC INTEREST. SUCH MATTERS ARE NOT APPROPRIATE FOR DECISIONS IN THE COURTS."

I THINK WE SHALL SEE THE VERY CONSIDERABLE EFFECT OF THE JUDGMENT IN THE GOURIET CASE OVER THE NEXT FEW YEARS. CERTAINLY IT HAS BROUGHT HOME TO ME, ONCE AGAIN, THE IMPORTANCE OF THE RESPONSIBILITIES VESTED IN MY OFFICE; RESPONSIBILITIES WHICH GO BEYOND THE MERE APPLICATION OF LAW AND THE PRESERVATION OF ORDER, RESPONSIBILITIES WHICH MUST INCLUDE GUARANTEES OF JUSTICE, FAIRNESS AND DUE PROCESS.



DR. LEON RADZINOWICZ, THE FAMOUS CAMBRIDGE CRIMINOLOGIST, HAS ENCAPSULATED VERY CLEARLY MY CONCERN THAT A FAIR BALANCE BE STRUCK BETWEEN THE RIGHTS OF INDIVIDUALS AND THE RIGHTS OF SOCIETY. HE SAID AND I QUOTE:

"FOR ALL ITS IMPERFECTIONS, THE CRIMINAL LAW IS DESIGNED NOT MERELY AS A BUTTRESS FOR THE PRIVILEGES OF THE POWERFUL, BUT AS A SHIELD FOR ELEMENTAL HUMAN LIBERTIES OF THE POOR AND WEAK AGAINST THE ASSAULTS OF THE STRONG AND THE TREACHEROUS. IN THAT CONTEXT, THE RIGOUR OF THE LAW MUST BE SEEN AS AN EXPRESSION OF SOCIAL CONCERN. THERE IS A PLACE FOR SEVERITY OF SENTENCE IN RESPONSE TO DELIBERATE AND CALLOUS CRIME, BUT THAT DOES NOT MEAN THAT WE MUST ALSO ACCEPT, LET ALONE COLLUDE IN, THE EROSION OF CRIMINAL JUSTICE OR DELIBERATE INHUMANITY IN DEALING WITH OFFENDERS. TO DO SO IS AS UNLIKELY AS ANY OTHER APPROACH TO BRING ABOUT A LASTING REDUCTION. IT WOULD SIMPLY HEAP OTHER EVILS ON TOP OF THE EVILS OF CRIME."

AND NOW, IN THE REMAINING FEW MINUTES I WOULD LIKE TO SPEAK OF THE ATTORNEY GENERAL'S ROLE IN RELATION TO THE SUPERVISION OF GOVERNMENT LEGISLATION AND LAW REFORM.

IN ONTARIO THE DUTY OF THE ATTORNEY GENERAL TO SUPERINTEND ALL GOVERNMENT MEASURES OF A LEGISLATIVE NATURE IS EXERCISED



THROUGH A NUMBER OF DIFFERENT FORMS OF MACHINERY.

AT THE MOST IMMEDIATE LEVEL, A HEAVY DEGREE OF SUPERINTENDENCE TAKES PLACE THROUGH MY DIRECT RESPONSIBILITY FOR THE ADMINISTRATION OF APPROXIMATELY 130 STATUTES MOST OF WHICH RELATE TO THE ADMINISTRATION OF JUSTICE AND THE MECHANISMS FOR THE ORDERLY SETTLEMENT OF PROPERTY AND OTHER DISPUTES. MY MINISTRY IS RESPONSIBLE FOR THE PERIODIC REVIEW OF THESE STATUTES TO ENSURE THAT THEY ARE MEETING THE NEED FOR WHICH THEY WERE ENACTED. AMENDMENTS TO ANY OF THESE STATUTES ARE CARRIED INTO THE LEGISLATIVE ASSEMBLY BY THE ATTORNEY GENERAL WHO IS RESPONSIBLE FOR SHEPHERDING THE AMENDMENTS THROUGH THE ENTIRE LEGISLATIVE PROCESS AND WHO IS OF COURSE ALSO RESPONSIBLE DURING DAILY QUESTION PERIOD AND IN DEBATE FOR ANY DEFICIENCIES IN THESE STATUTES.

I SHOULD MENTION THAT IN DEALING WITH LEGISLATION GENERALLY, THE ATTORNEY GENERAL IS FORTUNATE TO HAVE AS A MEMBER OF HIS MINISTRY THE LEGISLATIVE COUNSEL'S OFFICE, WHICH NOT ONLY DRAFTS LEGISLATION BUT ALSO PROVIDES LEGAL SERVICES TO THE LEGISLATIVE ASSEMBLY.

ANOTHER MECHANISM FOR THE ATTORNEY GENERAL'S SUPERINTENDENCE OF GOVERNMENT LEGISLATION IS THE PERIODIC REVIEW OF ALL GOVERNMENT STATUTES SUCH AS THE ONE CONDUCTED BY THE ROYAL COMMISSION OF INQUIRY INTO CIVIL RIGHTS UNDER THE DISTINGUISHED CHAIRMANSHIP OF THE HONOURABLE J.C. McRUER, FORMERLY A CHIEF JUSTICE OF THE TRIAL DIVISION OF THE SUPREME COURT OF ONTARIO. THAT REPORT, TO WHICH I REFERRED EARLIER, FOCUSED ON THE REQUIREMENTS OF NATURAL JUSTICE IN THE



EXERCISE OF ADMINISTRATIVE POWERS. IT RECOMMENDED A VERY SWEEPING OVERHAUL OF ALL OF THE ADMINISTRATIVE TRIBUNALS WHICH, IN ONTARIO AS WELL AS IN MANY OTHER PARTS OF THE WORLD HAVE COME TO EXERCISE A HUGE AMOUNT OF DISCRETIONARY POWER OVER INDIVIDUAL CITIZENS. THE McRUER REPORT RECOMMENDED A COMPREHENSIVE SET OF STANDARDS FOR THE ORGANIZATION AND CONTROL OF ADMINISTRATIVE TRIBUNALS AND FOR THE EXERCISE OF THEIR POWER IN A MATTER CONSISTENT WITH THE REQUIREMENTS OF NATURAL JUSTICE. STATUTE REVISION COUNSEL IN THE MINISTRY OF THE ATTORNEY GENERAL SUPERVISED THE ENORMOUS TASK OF REWRITING ALL STATUTES, WHICH GRANTED ANY FORM OF ADMINISTRATIVE POWER, IN SUCH A MANNER AS TO CONFORM TO THE PRINCIPLES OF NATURAL JUSTICE ACCORDING TO THE STANDARDS SET OUT IN THE McRUER REPORT. IT WAS A HERCULEAN JOB, PERHAPS MORE SUITED TO THE TALENTS OF A PHILOSOPHER KING THAN TO THE SKILLS OF A LAWYER, BUT THE TASK WAS DISCHARGED WITH THE UTMOST DISTINCTION. A HUGE AMOUNT OF LEGISLATION HAS BEEN ENACTED SINCE THEN TO GIVE EFFECT TO THE PRINCIPLES AND DECLARATIONS SET OUT IN THE McRUER REPORT.

THE CENTRAL ROLE OF THE ATTORNEY GENERAL AND HIS MINISTRY IN THIS PROCESS REPRESENTS THE DISCHARGE OF ONE OF THE DUTIES OF OFFICE WHICH HAS BEEN DESCRIBED AS FOLLOWS BY MR. JUSTICE McRUER:

"THE DUTY OF THE ATTORNEY GENERAL TO SUPERVISE LEGISLATION IMPOSES ON HIM A RESPONSIBILITY TO THE PUBLIC THAT TRANSCENDS HIS RESPONSIBILITY TO HIS COLLEAGUES IN THE CABINET. IT REQUIRES





HIM TO EXERCISE CONSTANT VIGILANCE TO SUSTAIN AND  
DEFEND THE RULE OF LAW AGAINST DEPARTMENTAL  
ATTEMPTS TO GRASP UNHAMPERED ARBITRARY POWERS...."

IN THIS CONNECTION I SHOULD POINT OUT ONE WAY IN WHICH THE  
ATTORNEY GENERAL MAINTAINS A DEGREE OF INDEPENDENCE FROM  
THE GOVERNMENT AND ACHIEVES A CERTAIN DEGREE OF CONSISTENCY  
THROUGHOUT THE ENTIRE LEGAL SYSTEM OF THE PROVINCE IS  
THE METHOD BY WHICH ALL GOVERNMENT DEPARTMENTAL LAWYERS  
ARE IN FACT MEMBERS OF THE MINISTRY OF THE ATTORNEY GENERAL.  
EVEN THOUGH THEY WORK IN A DEPARTMENT, THEY ARE, NONETHELESS,  
CROWN LAW OFFICERS EMPLOYED BY THE COMMON LEGAL SERVICES  
BRANCH OF MY MINISTRY ON BEHALF OF THE ATTORNEY GENERAL.  
THIS MEASURE ENCOURAGES INDEPENDENCE OF LEGAL OPINION WITHIN  
THE VARIOUS GOVERNMENT DEPARTMENTS AND RESULTS IN THAT  
ESSENTIAL CONSULTATION ON POINTS OF LAW THROUGHOUT GOVERNMENT  
WHICH IS NECESSARY TO ACHIEVE A UNIFORM APPROACH AND STANDARD  
OF EXCELLENCE.

FINALLY I WISH TO REFER TO THE ROLE OF ATTORNEY GENERAL  
IN RELATION TO LAW REFORM, SINCE THE REFORM OF OUR LAW  
IN RELATION TO THE FAMILY AND SUCCESSION TO PROPERTY HAS BEEN  
ONE OF MY HIGHEST PRIORITIES DURING MY TERM OF OFFICE.

THE LAW REFORM FUNCTION OF THE ATTORNEY GENERAL FOR ONTARIO  
IS ONE OF THE MOST INTERESTING AND CHALLENGING DUTIES OF  
THAT OFFICE.



BUT, LAW REFORM IS A TIME-CONSUMING AND ABSORBING TASK. THE PRINCIPLES OF REFORM CAN ONLY BECOME A CONCRETE REALITY WHEN THEY HAVE UNDERGONE A LENGTHY PROCESS OF DETAILED AND SEARCHING EXAMINATION IN THE LEGISLATURE. IN THIS PROCESS OF PAINSTAKING ATTENTION TO DETAIL, ABSORBING THOUGH IT MAY BE, ONE CAN NEVER LOSE SIGHT OF THE CENTRAL GOALS OF LAW REFORM IN THE CLASSIC SENSE THAT WAS EXPRESSED SO MANY YEARS AGO BY LORD BROUGHAM IN HIS FAMOUS SPEECH:

"IT WAS THE BOAST OF AUGUSTUS.....THAT HE FOUND ROME OF BRICK, AND LEFT IT OF MARBLE, A PRAISE NOT UNWORTHY A GREAT PRINCE, AND TO WHICH THE PRESENT REIGN ALSO HAS ITS CLAIMS. BUT HOW MUCH NOBLER WILL BE THE SOVEREIGN'S BOAST, WHEN HE SHALL HAVE IT TO SAY, THAT HE FOUND LAW DEAR, AND LEFT IT CHEAP; FOUND IT A SEALED BOOK - LEFT IT A LIVING LETTER; FOUND IT THE PATRIMONY OF THE RICH - LEFT IT THE INHERITANCE OF THE POOR; FOUND IT THE TWO-EDGED SWORD OF CRAFT AND OPPRESSION - LEFT IT THE STAFF OF HONESTY AND THE SHIELD OF INNOCENCE."

I CAN THINK OF NO BETTER PRECEPT WITH WHICH TO LEAVE THESE THOUGHTS ON THE OFFICE OF ATTORNEY GENERAL. LORD BROUGHAM'S RUBRIC QUITE PROPERLY EMPHASIZES THE PARAMOUNT PRIORITY OF THE ADMINISTRATION OF JUSTICE SERVING EVERY MEMBER OF THE PUBLIC. THIS IS EMINENTLY TRUE THROUGHOUT THE COMMONWEALTH, NO MATTER WHAT PARTICULAR MACHINERY HAS BEEN CHOSEN BY EACH COUNTRY FOR THE BEST WORKING OF THE INDEPENDENCE AND ACCOUNTABILITY OF THE CHIEF LAW OFFICER OF THE CROWN. THOSE OF US WHO ARE PRIVILEGED TO SERVE IN THIS OFFICE CANNOT HELP BUT BE HUMBLLED BY THE SENSE OF HISTORICAL TRADITION AND DUTY WHICH



HAS FROM THE EARLIEST DAY INFUSED THE WORK OF THE ATTORNEY GENERAL. I HOPE THAT THROUGHOUT THE COMMONWEALTH THOSE OF US WHO BELIEVE IN THE RULE OF LAW MIGHT TURN OUR THOUGHTS FROM TIME TO TIME TO THE CENTRAL TRADITIONS WHICH SUSTAIN THE OFFICE OF ATTORNEY GENERAL AND TO THE SHARED TRADITIONS OF ORDERED LIBERTY UNDER LAW WHICH FORM THE DEEPEST VALUES OF THAT OFFICE.



## CHAPTER 101

## The Crown Attorneys Act

**1.**—(1) The Lieutenant Governor in Council may appoint a Crown attorney for each county and for each provisional judicial district and such Crown attorneys and assistant Crown attorneys for the Province as he considers necessary. R.S.O. 1960, c. 82, s. 1; 1964, c. 15, s. 1 (1). Appointment

(2) The Crown attorneys and assistant Crown attorneys appointed for the Province or a county or provisional judicial district thereof shall act anywhere in the Province as directed by the Director of Public Prosecutions. 1964, c. 15, s. 1 (2); 1967, c. 18, s. 1. Special Crown attorneys

**2.** The Lieutenant Governor in Council may appoint one or more assistant Crown attorneys for any county or provisional judicial district who shall act under the direction of the Crown attorney and when so acting has the like powers and shall perform the like duties as the Crown attorney. R.S.O. 1960, c. 82, s. 2. Assistant Crown attorneys

**3.**—(1) The Lieutenant Governor in Council may appoint a Crown Attorney, a Deputy Crown Attorney and such assistant Crown attorneys as he deems necessary for the Judicial District of York who shall be known respectively as the Crown Attorney, the Deputy Crown Attorney and the Assistant Crown Attorneys for the Judicial District of York. Judicial District of York

(2) The Deputy Crown Attorney and the Assistant Crown Attorneys for the Judicial District of York shall act under the direction of the Crown Attorney for the Judicial District of York and when so acting shall have the like powers and perform the like duties as the Crown Attorney for the Judicial District of York. 1961-62, c. 26, s. 1, *amended*. Idem

**4.** No person shall be appointed a Crown attorney or assistant Crown attorney or act in either of such capacities who is not a member of the bar of Ontario. R.S.O. 1960, c. 82, s. 4. Qualification

**5.**—(1) When a Crown attorney or an assistant Crown attorney is absent or ill or is unable to perform all his duties, the Deputy Minister of Justice and Deputy Attorney General may appoint a member of the bar of Ontario to act *pro tem* as Crown attorney or assistant Crown attorney, as the case may be, during the period that the Crown attorney or assistant Crown attorney is absent or ill or is unable to perform all his duties. 1961-62, c. 26, s. 2, *amended*. Pro tem appointments





Idem

(2) When there is a vacancy in the office of Crown attorney, the Deputy Minister of Justice and Deputy Attorney General may appoint a member of the bar of Ontario to act *pro tem* as Crown attorney until the vacancy is filled by the Lieutenant Governor in Council. 1962-63, c. 29, s. 1, *amended*.

Clerk of  
the peace

6.—(1) Except in the Judicial District of York, every Crown attorney is *ex officio* clerk of the peace for the county or district for which he is Crown attorney.

Judicial  
District  
of York

(2) In the Judicial District of York, the offices of Crown attorney and clerk of the peace may be held by different persons.

Court  
duties

(3) Where the offices of Crown attorney and clerk of the peace are held by the same person, the duties that the clerk of the peace is required to perform in the court room during the sittings of the court of general sessions of the peace and of the county or district court judges' criminal court shall be performed by the clerk of the county or district court. R.S.O. 1960, c. 82, s. 6, *amended*.

*Pro tem*  
appoint-  
ments

(4) When a Crown attorney is absent or ill or is unable to perform his duties as clerk of the peace, or when there is a vacancy in the office of clerk of the peace, the Deputy Minister of Justice and Deputy Attorney General may appoint another Crown attorney to act *pro tem* as clerk of the peace during the period that the Crown attorney is absent or ill or is unable to perform his duties as clerk of the peace, or until there is no longer a vacancy in the office of the clerk of the peace, as the case may be. 1967, c. 18, s. 2, *amended*.

Fees

~~7.—(1) Unless it is otherwise provided by the Lieutenant Governor in Council, every Crown attorney is entitled to the fees of his office, including the fees received from his office as clerk of the peace.~~

Commuta-  
tion of fees

~~(2) The Lieutenant Governor in Council may commute the fees payable to a Crown attorney, including the fees receivable from his office as clerk of the peace, for a fixed annual sum, and may from time to time fix an annual allowance to cover the expenses of his office.~~

Assistants

~~(3) Every assistant Crown attorney is entitled to such per diem allowance or such salary as may be fixed by the Lieutenant Governor in Council. R.S.O. 1960, c. 82, s. 7 (1-3).~~

*Pro tem*  
Crown  
attorneys

~~(4) Every Crown attorney appointed *pro tem* by the Deputy Minister of Justice and Deputy Attorney General is entitled to the fees of his office, including the fees receivable from his office as clerk of the peace. R.S.O. 1960, c. 82, s. 7 (4); 1962-63, c. 29, s. 2, *amended*.~~



## CHAPTER 134

## An Act to amend The Crown Attorneys Act

*Assented to December 4th, 1973  
Session Prorogued March 5th, 1974*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Section 7 of *The Crown Attorneys Act*, being chapter 101 of the Revised Statutes of Ontario, 1970, is repealed and the following substituted therefor: <sup>s. 7.  
re-enacted</sup>

7.—(1) The Attorney General may by order authorize persons appointed under *The Public Service Act* to be provincial prosecutors. <sup>Provincial  
prosecutors  
R.S.O. 1970,  
c. 386</sup>

(2) A provincial prosecutor may be a person who is not a member of the bar. <sup>Qualifica-  
tions</sup>

(3) A provincial prosecutor shall act anywhere in Ontario as directed by the Director of Crown attorneys of the Ministry of the Attorney General. <sup>Jurisdiction</sup>

(4) A provincial prosecutor shall conduct such prosecutions for offences punishable on summary conviction as are delegated to him by the Crown attorney for the county or provisional judicial district in which the provincial prosecutor acts and shall be subject to the direction and supervision of the Crown attorney. <sup>Duties</sup>

(5) Every provincial prosecutor before he enters upon his duties shall take and subscribe before a Crown attorney the following oath: <sup>Oath</sup>

I swear that I will truly and faithfully, according to the best of my skill and ability, execute the duties, powers and trusts of provincial prosecutor for Ontario without favour or affection to any party. So help me God.

2. Section 11 of the said Act is amended by inserting after "attorney" in the first line "and every provincial prosecutor". <sup>s. 11,  
amended</sup>
3. This Act comes into force on the day it receives Royal Assent. <sup>Commence-  
ment</sup>
4. This Act may be cited as *The Crown Attorneys Amendment Act, 1973 (No. 2)*. <sup>Short title</sup>



**8.** Every Crown attorney shall give security for the due performance of the duties of his office and for the due payment of all moneys received by him by virtue thereof, in such sum, and with so many sureties, and in such manner and form as the Lieutenant Governor in Council may direct. R.S.O. 1960, c. 82, s. 10. Security

**9.** Every Crown attorney and every assistant Crown attorney, before he enters upon his duties, shall take and subscribe before a judge of the county or district court of the county or district for which he is appointed the following oath: Oath of office

I swear that I will truly and faithfully, according to the best of my skill and ability, execute the duties, powers and trusts of Crown attorney (or assistant Crown attorney) for the County (or District) of . . . . . without favour or affection to any party: So help me God.

R.S.O. 1960, c. 82, s. 11.

**10.—(1)** No Crown attorney or assistant Crown attorney shall, by himself or through any partner in the practice of law, act or be directly or indirectly concerned as counsel or solicitor for any person in respect of any offence charged against such person under the laws in force in Ontario. R.S.O. 1960, c. 82, s. 12. Prohibition

(2) Subsection 1 does not apply to part-time assistant Crown attorneys. 1964, c. 15, s. 2. Exception

**11.** Every Crown attorney is the agent of the Minister of Justice and Attorney General for the purposes of the *Criminal Code* (Canada). R.S.O. 1960, c. 82, s. 13, *amended*. Minister of Justice and Attorney-General's agent  
1953-54, c. 51 (Can.)

**12.** The Crown attorney shall aid in the local administration of justice and perform the duties that are assigned to Crown attorneys under the laws in force in Ontario, and, without restricting the generality of the foregoing, every Crown attorney shall, Duties:

- (a) examine informations, examinations, depositions, recognizances, inquisitions and papers connected with offences against the laws in force in Ontario that the provincial judges, justices of the peace and coroners are required to transmit to him, and, where necessary, cause such charges to be further investigated, and additional evidence to be collected, and sue out process to compel the attendance of witnesses and the production of papers, so that prosecutions may not be delayed unnecessarily or fail through want of proof; to examine informations, etc.
- (b) conduct, on the part of the Crown, preliminary hearings of indictable offences and prosecutions for indictable offences, to conduct prosecutions



- (i) at the sittings of the Supreme Court where no law officer of the Crown or other counsel has been appointed by the Minister of Justice and Attorney General,
- (ii) at the court of general sessions of the peace,
- (iii) at the county or district court judges' criminal court, and
- (iv) before provincial judges in summary trials of indictable offences under the *Criminal Code* (Canada),
- in the same manner as the law officers of the Crown conduct similar prosecutions at the sittings of the Supreme Court, and with the like rights and privileges, and attend to all criminal business at such courts;
- (c) where a law officer of the Crown or other counsel has been appointed by the Minister of Justice and Attorney General, deliver to the Crown officer or other counsel all papers connected with the criminal business at the sittings of the Supreme Court before the opening of the court and, if required, be present at the court and assist the Crown officer or other counsel;
- (d) watch over cases conducted by private prosecutors and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his interposition;
- (e) where in his opinion the public interest so requires, conduct proceedings in respect of any offence punishable on summary conviction;
- (f) when requested in writing, cause prosecutions for offences against any Act of the Legislature to be instituted on behalf of any governmental department or agency and conduct such prosecutions to judgment and to appeal, if so instructed;
- (g) where in his opinion the public interest so requires, conduct appeals to the county or district court for offences punishable on summary conviction;
- (h) advise justices of the peace with respect to offences against the laws in force in Ontario;
- (i) procure the necessary forms for the use of justices of the peace, and supply them as needed, the expense of which shall be paid out of the county funds as part of the expenses connected with the administration of justice, except where such forms are supplied by the county council through the clerk of the county or the clerk of the peace; and

1953-54,  
c. 51 (Can.)

special  
Crown  
counsel

cases  
brought  
by private  
prosecutors

summary  
conviction  
matters

government  
prosecutions

summary  
conviction  
appeals

justices of  
the peace

forms





- (j) where a prisoner is in custody charged with or convicted of an offence and an application is made for bail, inquire into the facts and circumstances and satisfy himself as to the sufficiency of the surety or sureties offered, and examine and approve of the bail bonds where bail is ordered. R.S.O. 1960, c. 82, s. 14, *amended*.

**13.** Where a person is committed for trial to answer a criminal charge, the committing provincial judge shall deliver or cause to be delivered without delay to the Crown attorney the informations, depositions, examinations, recognizances and papers connected with the charge, and the Crown attorney is the "proper officer of the court by which the accused is to be tried" within the meaning of the committal for trial provisions of the *Criminal Code* (Canada) and, where an information has been laid before a justice of the peace, whether proceedings have been taken thereon or not, the justice shall deliver to the Crown attorney all papers connected therewith on being required by him so to do. R.S.O. 1960, c. 82, s. 15, *amended*.

Provincial judges and justices to deliver informations, etc., to Crown attorney

1953-54, c. 51 (Can.)

**14.** Every Crown attorney, except a Crown attorney on fees, shall collect all fees payable to him as Crown attorney and clerk of the peace and remit them to the Inspector of Legal Offices by cheque payable to the Treasurer of Ontario quarterly on the 1st day of January, April, July and October in each year, together with a statement showing the fees collected. R.S.O. 1960, c. 82, s. 16.

Collection and payment over of fees

**15.** Every Crown attorney and clerk of the peace shall, on or before the 31st day of January in every year, make to the Inspector of Legal Offices a return, verified by statutory declaration, of the aggregate amount of the fees and emoluments of his office during the preceding year, up to and including the 31st day of December. R.S.O. 1960, c. 82, s. 17.

Annual returns

**16.** The Lieutenant Governor in Council may make regulations,

Regulations

- (a) prescribing fees and travelling allowances for Crown attorneys or any class thereof in connection with prosecutions instituted on behalf of any governmental department or agency, and providing for the payment and disposition thereof;
- (b) prescribing fees and travelling allowances for Crown attorneys or any class thereof in connection with appeals to the county or district court for offences punishable on summary conviction, and providing for the payment thereof;
- (c) fixing the responsibility for the payment of fees and travelling allowances of Crown attorneys;



R.S.O. 1970,  
c. 450

- (d) providing that counsel fees collected from defendants under *The Summary Convictions Act* shall be credited on the Crown attorney's fees that are properly payable to him by a municipality or a governmental department or agency;
  - (e) providing fees and charges payable to Crown attorneys not otherwise provided for under this or any other Act, and providing for the payment thereof;
  - (f) for carrying out the provisions of any Act imposing duties upon or touching the office of Crown attorney;
  - (g) with respect to the prosecution by Crown attorneys of offenders against the laws in force in Ontario;
  - (h) providing for the safekeeping, inspection and destruction of books, documents and papers of Crown attorneys;
  - (i) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act. R.S.O. 1960, c. 82, s. 18.
-



## CHAPTER 2

## OFFICE OF THE CROWN ATTORNEY

### S U M M A R Y

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- B. FUNCTIONS AND DUTIES OF CROWN ATTORNEYS
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    - (b) Advice to Justices of the Peace
    - (c) Advice to Members of the Public
  - 3. Under *The Coroners Act*
  - 4. As Clerk of the Peace
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  - 2. Termination of Employment
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  - 3. Regional Meetings of Crown Attorneys
  - 4. Meetings of the Crown Attorneys' Association



5. The Crown Attorneys' School
6. An Information Service for Crown Attorneys

G. PLEA NEGOTIATION

H. SUMMARY OF RECOMMENDATIONS

Appendix I

Appendix II

Appendix III

Appendix IV

Appendix V

Appendix VI

A. HISTORY OF PUBLIC PROSECUTIONS IN ONTARIO

In Ontario, most criminal prosecutions are conducted by Crown attorneys and their assistants.<sup>1</sup> They are agents of the provincial Attorney General acting in the name of the Crown. The office is defined by statute.<sup>2</sup>

Originally the authority to prosecute rested with the Attorney General and his officers at the capital of Upper Canada. As the population of Ontario expanded it became increasingly difficult for the law officers of the Crown effectively to perform their duties.<sup>3</sup> In 1859, statutory authority was granted for the creation of prosecution offices in each county.<sup>4</sup> The County Crown attorney was empowered, *inter alia*, to receive and examine informations from magistrates and to conduct further investigations if necessary, sue out process to compel attendance of witnesses and watch over private prosecutions, taking them over if necessary. He was made responsible for instituting and conducting prosecutions for felonies and some summary matters.<sup>5</sup> The duties of the office of Crown attorney have remained substantially the same since its inception, but other statutory powers and duties have been conferred upon the Crown attorneys from time to time.

<sup>1</sup>A small number of prosecutions are conducted by private prosecutors and federal prosecutors.

<sup>2</sup>*The Crown Attorneys Act*, R.S.O. 1970, c. 101.

<sup>3</sup>Bull, "The Career Prosecutor of Canada", (1962), 43 J.Crim. L. 89.

<sup>4</sup>*An Act Respecting County Attorneys* (cited as *The Local Crown Attorneys' Act*), C.S.U.C. 1859, c. 106.

<sup>5</sup>*Ibid.* s. 1 Secondly—He shall institute and conduct on the part of the Crown prosecutions for felonies and misdemeanors at the Court of Quarter Sessions for the County he is appointed to, in the same manner as the Law Officers of the Crown institute and conduct similar prosecutions at the Assizes . . .

Fifthly—If required by the general regulations touching his office to be made in pursuance of the provisions hereinafter contained he shall institute and conduct proceedings before Justices of the Peace under any Act or law conferring summary powers to convict for offences in relation to the Public Revenue, the Public Property, the Public Domain, the Public Peace, the Public Health, and any other matter made punishable on summary conviction before Justices of the Peace, and the County Attorney is hereby empowered to institute such proceedings, on a complaint in writing, or as Public Prosecutor, in cases wherein the public interests require the exercise of such office.





The establishment of the office of public prosecutor in Ontario was predated by the creation of similar institutions in Scotland and Ireland, continental Europe and in the American colonies. A brief resume of the systems for conducting public prosecutions in these jurisdictions and in England, where there has been no office comparable to that of Crown attorney, is contained in Appendix I. It has been suggested that the influx of American loyalists after the War of Independence influenced the decision in Ontario to create appointive rather than elective offices.<sup>6</sup> It may be that the concept of the office has its origins in jurisdictions which were the homelands of many early settlers.

Provision has been made in the other Canadian provinces for agents of the Attorney General with similar duties. British Columbia is an exception. There, organized municipalities and regions have the right to appoint local prosecutors. The duties they perform, however, are not unlike those of Crown attorneys in other provinces.

## B. FUNCTIONS AND DUTIES OF CROWN ATTORNEYS

### 1. Prosecutorial

The *British North America Act* confers on the Province the exclusive power to make laws in relation to

The Administration of Justice in the Province including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.<sup>7</sup>

Exclusive authority is conferred on the Parliament of Canada to make laws in relation to

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.<sup>8</sup>

Within this constitutional framework both the Attorney General of Canada and the Attorney General for Ontario as chief law officers of the Crown have powers and duties with respect to the matters within their respective legislative jurisdictions. The *Department of Justice Act* provides:

The Attorney General of Canada shall be entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *British North America Act, 1867*, came into effect, so far as those laws under the

<sup>6</sup>Bull, *op. cit.* n. 3 *supra*, at p. 90.

<sup>7</sup>Section 92(14).

<sup>8</sup>*B.N.A. Act*, s. 91(27).



provisions of the said Act are to be administered and carried into effect by the Government of Canada.<sup>9</sup>

*The Ministry of the Attorney General Act*<sup>10</sup> provides:

The Minister, . . . shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, up to the time of the *British North America Act, 1867* came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature.

Responsibility for the conduct of most prosecutions under the *Criminal Code* is imposed chiefly on the Attorney General for Ontario under section 92(14) of the *British North America Act*. The Attorney General of Canada, however, has in practice conducted most, if not all, prosecutions under federal statutes such as the *Narcotic Control Act*, the *Income Tax Act*, the *Combines Investigation Act*, the *Customs Act*, the *Excise Tax Act* and the *Unemployment Insurance Act*.<sup>11</sup>

In the exercise of its jurisdiction under section 92(14) of the *British North America Act* the Province has enacted *The Crown Attorneys Act*<sup>12</sup> constituting every Crown attorney the statutory agent of the Attorney General for the purposes of the *Criminal Code*<sup>13</sup> and imposing on Crown attorneys the general duty to "aid in the local administration of justice".<sup>14</sup> More specifically, the Crown attorney is to perform all duties that are assigned to Crown attorneys under the laws in force in Ontario and to:

- (b) conduct, on the part of the Crown, preliminary hearings of indictable offences and prosecutions for indictable offences,
  - (i) at the sittings of the Supreme Court where no law officer of the Crown or other counsel has been appointed by the Attorney General,
  - (ii) at the court of general sessions of the peace,
  - (iii) at the county or district court judges' criminal court, and
  - (iv) before provincial judges in summary trials of indictable offences under the *Criminal Code* (Canada),

<sup>9</sup>R.S.C. 1970, c. J-2, s. 5(a).

<sup>10</sup>R.S.O. 1970, c. 116, s. 5(d) renamed by S.O. 1972, c. 1, s. 9(1).

<sup>11</sup>The recent decision of Vannini, D.C.J. in *R. v. Collins*, [1973] 1 O.R. 510 explores extensively the history of the office of Attorney General and the constitutionality of the definition of Attorney General in s. 2(b) of the *Criminal Code*. The section confers on the Attorney General of Canada (or his agent or anyone with his written consent) the exclusive jurisdiction to prefer indictments under s. 496(1) of the *Criminal Code* in respect of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of any violation of or conspiracy to violate any other Act of the Parliament of Canada or a regulation made thereunder.

<sup>12</sup>R.S.O. 1970, c. 101.

<sup>13</sup>*Ibid.* s. 11.

<sup>14</sup>*Ibid.* s. 12.



in the same manner as the law officers of the Crown conduct similar prosecutions at the sittings of the Supreme Court, and with the like rights and privileges, and attend to all criminal business at such courts;

- (c) where a law officer of the Crown or other counsel has been appointed by the Attorney General, deliver to the Crown officer or other counsel all papers connected with the criminal business at the sittings of the Supreme Court before the opening of the court and, if required, be present at the court and assist the Crown officer or other counsel;
- (d) watch over cases conducted by private prosecutors and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his interposition;
- (e) where in his opinion the public interest so requires, conduct proceedings in respect of any offence punishable on summary conviction;
- (f) when requested in writing, cause prosecutions for offences against any Act of the Legislature to be instituted on behalf of any governmental department or agency and conduct such prosecutions to judgment and to appeal, if so instructed;
- (g) where in his opinion the public interest so requires, conduct appeals to the county or district court for offences punishable on summary conviction.<sup>15</sup>

In accordance with the statutory prescription, Crown attorneys conduct all preliminary inquiries before Provincial judges, and most trials of indictable offences before Provincial judges including those that may be tried summarily on the election of the Crown. Crown attorneys customarily assume full responsibility for the conduct of prosecutions under the *Criminal Code* in the General Sessions of the Peace, the County Court Judges' Criminal Courts and in the Assizes, although departmental law officers or other members of the bar are occasionally instructed by the Attorney General to appear on his behalf at an Assize to prosecute a case which has no locus within a county or is particularly complicated.<sup>16</sup>

In summary conviction matters responsibility for prosecutions is fragmented. This confusing pattern emerges. Where an offence arises under Part XXIV of the *Criminal Code* or is one which is punishable summarily at the election of the accused, the Crown attorney usually prosecutes. When an offence punishable on summary conviction arises under a provincial statute, a police officer, not a Crown attorney, usually conducts the prose-

<sup>15</sup>*Ibid.* s. 12(b)-(g) as amended by S.O. 1972, c. 1, s. 1.

<sup>16</sup>For the statutory limitations on the right to conduct prosecutions of indictable offences under the *Criminal Code* see the definition of prosecutor in s. 2 and the manner of preferring an indictment (the documentary basis of prosecutions in the superior courts) in ss. 496 and 505. Informations (the documentary basis of prosecutions in the Provincial Courts) are usually sworn to by police officers or private citizens who institute the proceedings.





cution.<sup>17</sup> Certain divisions of government departments such as Corporations Tax, Health and Agriculture employ departmental solicitors who are instructed to conduct prosecutions involving departmental legislation. Responsibility for the prosecution of municipal by-law offences frequently is assumed by members of the municipality's legal staff. In Toronto, offences under *The Liquor Control Act* and *The Liquor Licence Act* are prosecuted by an official known as the City Prosecutor. All prosecutions under provincial legislation which are not conducted by Crown attorneys continue to come under their general supervision by law.<sup>18</sup>

Crown appeals in summary conviction matters in practice are both instituted and conducted by Crown attorneys, while appeals of judgments in indictable matters are usually conducted by the legal staff within the Ministry of the Attorney General.

An assistant Crown attorney has been assigned on a full-time basis to the Provincial Court (Family Division) in the Judicial District of York where he prosecutes many cases and advises on others. Outside the Judicial District of York there is no uniform practice with respect to the appearance of Crown attorneys in the Provincial Courts (Family Division).

Crown attorneys are required to prepare and prefer indictments in proceedings before grand juries. If our recommendations made in chapter 12, Part I for the abolition of the grand jury are adopted, Crown attorneys will be relieved of this task.

In addition to the provisions of *The Crown Attorneys Act* imposing the general duty on the Crown attorney to prosecute, a number of other provincial statutes impose a specific duty on the Crown attorney to conduct prosecutions of offences under them. Examples such as *The Fire Marshals Act* and *The Liquor Control Act* may be found in Appendix III.

It would appear that the status of private prosecutors to conduct prosecutions of summary conviction offences is limited by the provisions of *The Crown Attorneys Act* which impose on Crown attorneys the responsibility to supervise prosecutions and assume wholly the conduct of cases where justice towards the accused seems to demand interposition.<sup>19</sup> It is questionable whether this provision can have any application in summary conviction proceedings under the *Criminal Code* where an informant relies on his entitlement under section 737(1) to conduct his case personally. It has been held that while a private person may prosecute at the summary trial of an indictable offence and a preliminary inquiry, he cannot conduct further proceedings following a committal for trial by a judge without a jury unless he can induce the Attorney General to intervene or unless he has his written consent; and that on trials by judge and jury he requires leave of the court or Attorney General.<sup>20</sup> It has also been judicially de-

<sup>17</sup>For the statutory authority for the conduct by the informant of summary conviction prosecutions under the *Criminal Code* see s. 737 and the definition of "prosecutor" and "informant" in s. 720(1).

<sup>18</sup>*The Crown Attorneys Act*, R.S.O. 1970, c. 101, s. 12(e).

<sup>19</sup>*Ibid.* s. 12(d).

<sup>20</sup>*R. v. Schwerdt* (1957), 119 C.C.C. 81.





terminated that at such a trial or preliminary inquiry the Attorney General or his agent is entitled to intervene and to withdraw the charge in the case of an information for an indictable offence.<sup>21</sup>

Incidental to the Crown attorney's functions as prosecutor are his exclusive right to determine what charges are to be maintained against an accused person,<sup>22</sup> his right to determine with respect to certain offences whether to prosecute by way of indictment or summary conviction<sup>23</sup> and his right to withdraw charges once laid.<sup>24</sup>

The importance of the Crown attorney's prosecutorial duties was expressed by the late Mr. Justice Rand in *R. v. Boucher* in the following terms:

The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.<sup>25</sup>

## 2. Advisory

### (a) Advice to the Police

The Crown attorney in the community is a quasi-judicial officer, who performs many duties in addition to prosecuting cases. The office is one that should be highly respected and those who fill it should conduct themselves to merit respect. In Ontario, this is usually the case.

Crown attorneys perform an important function in advising members of the public and the police concerning proposed prosecutions or prosecutions that have been instituted. They advise the police not only on cases immediately coming before the courts, but also on general procedural matters, investigations and the preparation of cases not immediately before the courts. In the smaller centres, the Ontario Provincial Police and the municipal police seek the advice of Crown attorneys concerning what charges if any should be laid in respect of particular fact situations. In northern Ontario, the police are especially dependent on Crown attorneys.

In Metropolitan Toronto, and to a lesser degree in the larger centres, the police in most cases determine in the first instance what charges should be laid, but advice as to the propriety of the charges as the cases develop is the responsibility of the Crown attorney.

Although there is no statutory obligation to advise the police, it is assumed that this is a proper function of the office. Much reliance is placed on the advice and assistance of Crown counsel at the Police College in Toronto and the Ontario Police College at Aylmer. A member of the Crown Attorneys' Association is an official representative to the latter.

<sup>21</sup>*R. v. Leonard, ex parte Graham* (1962), 133 C.C.C. 262.

<sup>22</sup>*R. v. Blahut et al.* (1954), 110 C.C.C. 75.

<sup>23</sup>*R. v. Wright*, [1964] 1 C.C.C. 365.

<sup>24</sup>*R. v. Garcia et al.*, [1970] 3 C.C.C. 124.

<sup>25</sup>*R. v. Boucher*, [1955] S.C.R. 16, at p. 23.



(b) *Advice to Justices of the Peace*

The Crown attorney is under a statutory obligation to aid in the local administration of justice<sup>26</sup> and to advise the justices of the peace "with respect to offences against the laws in force in Ontario".<sup>27</sup> The meaning of this provision is not clear. If it is intended to mean that the Crown attorney is to advise justices of the peace with respect to the performance of their judicial duties in specific cases it is bad in principle. If, on the other hand, it is intended to mean that the Crown attorney is required to be a sort of legal tutor to the justices of the peace it is equally bad in principle. As we indicated in the previous chapter, both these duties should be performed by Provincial judges. It may well be that Crown attorneys should participate in some way in the legal education of justices of the peace but it is not consistent with our concept of the independence of the judiciary in the administration of justice that they should advise the justices of the peace in specific cases.

There may be areas, however, where it may be proper for the Crown attorney to advise the justice of the peace on matters of form, e.g. whether an information as laid discloses any offence or whether a matter is within the jurisdiction of the justice of the peace and in matters of practice and procedure.

(c) *Advice to Members of the Public*

The Crown attorney is called upon to advise members of the public in a multitude of matters related to the administration of the criminal law and the provincial laws. In the Crown attorney's office, particularly in smaller communities, there is invariably a welter of complaints that have to be sorted out to determine whether a matter is one in which the Crown attorney should intervene or whether it is one for the civil law or private prosecution. The function that a good Crown attorney performs in a community, quite apart from his duties as a prosecutor, is a most important one. His office is not only a symbol of the authority of the law but a talisman of the protection of the law. For these reasons we believe that whatever moves are made toward regionalization of the administration of justice, a Crown attorney should continue to be appointed for each county or district where his assistance and advice will remain most accessible to the members of the public and to the local police services.

3. *Under The Coroners Act*

The Commission in its Report on the Coroner System in Ontario recommended that the principle of mandatory consultation between the coroner and Crown attorney be given legislative recognition.<sup>28</sup> Under the existing *Coroners Act*, the Crown attorney exercises certain preinquest powers of operational control. These powers include the ordering of the holding of an inquest;<sup>29</sup> preventing the transfer of an investigation from

<sup>26</sup>R.S.O. 1970, c. 101, s. 12.

<sup>27</sup>*Ibid.* s. 12(h).

<sup>28</sup>*Report on the Coroner System in Ontario*, 103 (1971).

<sup>29</sup>*The Coroners Act*, R.S.O. 1970, c. 87, s. 12.



one coroner to another;<sup>30</sup> and, after the issue of a warrant by a coroner to take possession of a body, instructing another coroner to take action.<sup>31</sup>

We concluded that there should be mandatory consultation with Crown attorneys on these matters but that the Act should not confer power to go beyond consultation. Power to direct and intervene in a coroner's case should be vested only in the Provincial Chief Coroner and in the Attorney General.<sup>32</sup>

*The Coroners Act* now in force also confers certain powers and responsibilities on Crown attorneys with respect to the conduct of inquests:

- (a) The Crown attorney may attend any inquest and must if directed to do so by the Attorney General.<sup>33</sup>
- (b) The Crown attorney may examine and cross-examine witnesses,<sup>34</sup> and may direct that particular persons be summoned as witnesses by the coroner.<sup>35</sup>
- (c) The Crown attorney must give his consent before an inquest may be held without a jury in a provisional judicial district,<sup>36</sup> and must approve of any appointments of persons by the coroner to record evidence at the inquest.<sup>37</sup>
- (d) The Crown attorney may order that the evidence be transcribed,<sup>38</sup> and may also require that an interpreter be employed by the coroner at the inquest.<sup>39</sup>
- (e) Finally, the Crown attorney is designated under *The Coroners Act* as the officer to whom the coroner must transmit the verdict of the jury.<sup>40</sup>

In our Report on Coroners we concluded that these are all functions appropriate to be performed by Crown attorneys to provide coroners with access to legal skills where desirable and proper legal direction where necessary.<sup>41</sup>

We found that attendance of Crown attorneys at inquests was irregular, and that in some counties including the Judicial District of York attendance was the exception rather than the rule.<sup>42</sup> (Appendix II contains data made available to us in this project, showing attendance by Crown attorneys at inquests for the period April to December, 1971.)

<sup>30</sup>*Ibid.* s. 15.

<sup>31</sup>*Ibid.* s. 10(3).

<sup>32</sup>*Op. cit.* n. 28 *supra*, at p. 65.

<sup>33</sup>R.S.O. 1970, c. 87, s. 25(1).

<sup>34</sup>*Ibid.*

<sup>35</sup>*Ibid.* s. 26(1).

<sup>36</sup>*Ibid.* s. 27(4).

<sup>37</sup>*Ibid.* s. 33(1).

<sup>38</sup>*Ibid.* s. 33(2).

<sup>39</sup>*Ibid.* s. 34.

<sup>40</sup>*Ibid.* s. 36.

<sup>41</sup>*Op. cit.* n. 28 *supra*, at p. 104.

<sup>42</sup>*Ibid.*



Our conclusion was that the need for proper legal counsel at inquests would be immediate and extensive if a new coroners act were passed and that the voluntary attendance of Crown attorneys be discontinued in favour of compulsory attendance at the request of the presiding officer.<sup>43</sup> We recommended that the Crown attorney retain his duties under section 36 of *The Coroners Act* with respect to exhibits at inquests but that the section be recast to place the responsibility on the Chief Coroner for duplicating and circulating copies of verdicts.

*The Coroners Act*, 1972,<sup>44</sup> which has not yet been proclaimed in force, embodies most of our recommendations. The provisions of that Act make it mandatory for Crown attorneys to attend all inquests.<sup>45</sup>

#### 4. *As Clerk of the Peace*

The office of clerk of the peace goes back to the birth of British institutions in Upper Canada. It was originally related to the functions and duties of the justices of the peace sitting in the Quarter Sessions of the Peace. These functions and duties covered a very wide range of subject matter. They extended from exercising jurisdiction in criminal cases to empowering the certification of the clergy of the Church of Scotland to perform marriages,<sup>46</sup> appointing constables,<sup>47</sup> nominating parish town officers where no town meeting had been held,<sup>48</sup> and appointing surveyors.<sup>49</sup>

In the several statutes conferring jurisdiction on the Quarter Sessions of the Peace there is reference to the clerk of the peace as one who performed administrative duties but nowhere in either the ancient or modern statutes have we been able to find any express statutory authority for the office. It is interesting that in 1859 in the Province of Upper Canada, clerks of the peace were required to be barristers of not less than three years' standing. They were *ex officio* County attorneys for the county to which they were appointed.<sup>50</sup>

The clerk of the peace had many other duties imposed on him. For example, the publication of notices concerning the forfeiture of the estates of aliens and traitors<sup>51</sup> and making out writs to the sheriff for levying arrears and assessments.<sup>52</sup>

It is unnecessary to pursue further the history of the office. It is sufficient to say that it appears to have been engrafted onto the law of Ontario by adoption and custom rather than statutory authority. We are concerned here with the office as it relates to Crown attorneys. Section 6 of *The Crown Attorneys Act* provides:

<sup>43</sup>*Ibid.* p. 105.

<sup>44</sup>S.O. 1972, c. 98.

<sup>45</sup>*Ibid.* s. 24.

<sup>46</sup>38 Geo. III, c. 14, s. 2.

<sup>47</sup>33 Geo. III, c. 2, s. 10.

<sup>48</sup>46 Geo. III, c. 5, s. 2.

<sup>49</sup>50 Geo. III, c. 1, s. 11.

<sup>50</sup>C.S.U.C. 1859, c. 106, s. 7.

<sup>51</sup>59 Geo. III, c. 22, s. 6.

<sup>52</sup>6 Geo. IV, c. 1, s. 7.





- (1) Except in the Judicial District of York, every Crown attorney is *ex officio* clerk of the peace for the county or district for which he is Crown attorney.
- (2) In the Judicial District of York, the offices of Crown attorney and clerk of the peace may be held by different persons.
- (3) Where the offices of Crown attorney and clerk of the peace are held by the same person, the duties that the clerk of the peace is required to perform in the courtroom during the sittings of the court of general sessions of the peace and of the county or district court judges' criminal court shall be performed by the clerk of the county or district court.

Until the recent retirement of the Clerk of the Peace for the Judicial District of York, the Crown attorney has not acted as clerk of the peace. Since his retirement no one has been appointed to fill that office and the Crown attorney now performs the duties attached to the office as do all other Crown attorneys in Ontario, and the traditional duties that were previously performed by the clerk of the peace as Clerk of the General Sessions of the Peace and County Court Judges' Criminal Court are now to be performed throughout Ontario by the clerks of the County and District Courts.

Under section 2 of the *Criminal Code*, "Clerk of the Court" includes "a person by whatever name or title he may be designated who from time to time performs the duties of the Clerk of the Court". Duties are imposed on the Clerk of the Court under several sections of the Code, particularly section 490 concerning the election to be tried by a judge without a jury and section 549 concerning procedure where an indictment is found against a corporation. Other important duties are imposed on the Clerk of the Court with respect to forfeiture of recognizances under Part XXII of the *Criminal Code*. In the Schedule to Part XXII, the "Clerk of the Court" is defined to mean in Ontario the "Clerk of the Peace" for the Court of General Sessions of the Peace in respect of a recognizance for the appearance of a person before that court, a judge acting under Part XVI, a justice or a magistrate.<sup>53</sup>

*The County Court Judges' Criminal Courts Act* provides that "the clerk of the peace for the county or district court is the clerk of the court constituted under this Act".<sup>54</sup> The result of this strange legislative tangle is that the Crown attorney is the Clerk of the General Sessions of the Peace and of the County Court Judges' Criminal Court but the duties are performed by the clerk of the County Court. It follows that this statutory circumlocution can be avoided by simply conferring on the clerk of the County and District Court the powers and duties of the clerk of the peace. The office of the clerk of the peace should be abolished unless there are compelling reasons to maintain it because of the duties required to be performed by the holder of the office under other statutes.

<sup>53</sup>*Criminal Code*, s. 696(1).

<sup>54</sup>R.S.O. 1970, c. 93, s. 1(3).



Under *The Coroners Act*<sup>55</sup> the Inspector of Legal Offices is required to send a certified copy of an Order-in-Council appointing a coroner to the clerk of the peace of the county or district in which the coroner is to act and it shall be filed by him in his office. For the purpose of record, it would be equally convenient to have the order filed with the County or District Court clerk. It would, however, be convenient to have an additional copy sent to the Crown attorney by reason of his concern in matters coming within *The Coroners Act*.

Under *The Small Claims Courts Act*<sup>56</sup> the clerk of the peace is required to perform duties and assume responsibility which could be equally well performed by the County or District Court clerk. These duties, which include acting as *pro tem* clerk of the Small Claims Court when that office is vacant, are not duties that ought to be performed by the Crown attorney.

*The Estreats Act*<sup>57</sup> is complementary to Part XXII of the *Criminal Code*. It is concerned with the procedure attendant on the forfeiture of recognizances given as security for the appearance of persons before the court. In other jurisdictions the duties imposed on the clerk of the peace under this Act are performed by the clerks of the respective courts.

Under *The Judicature Act*<sup>58</sup> a Notice of Motion to quash a conviction shall be served upon the clerk of the peace if the proceedings have been returned to his office.

*The Jurors Act*<sup>59</sup> provides:

The clerk of the peace shall attend all meetings of the county selectors and shall enter their proceedings and resolutions in a book kept for that purpose, *but he shall have no voice in the selection of jurors and shall not advise or express an opinion whether any name ought to be placed upon or omitted from the list of jurors.* [Emphasis added.]

The clerk of the peace has other duties under *The Jurors Act*. Section 10 provides that the annual meeting of the county selectors shall be held either in the courthouse or in the office of the clerk of the peace. He is required to produce for the county selectors copies of the voters' lists delivered to him by the clerks of the local municipalities, and to transmit copies of their resolutions determining the number of jurors to be drafted to the appropriate courts.<sup>60</sup>

Section 59(8) of *The Municipal Act*<sup>61</sup> enacts that a by-law establishing a polling subdivision shall be filed by the municipal clerk with the clerk

<sup>55</sup>R.S.O. 1970, c. 87, s. 4. See also *The Coroners Act*, 1972, S.O. 1972, c. 98, s. 3(6) not yet proclaimed in force.

<sup>56</sup>R.S.O. 1970, c. 439, ss. 10, 25, 48 and 50.

<sup>57</sup>R.S.O. 1970, c. 150.

<sup>58</sup>R.S.O. 1970, c. 228, s. 69.

<sup>59</sup>R.S.O. 1970, c. 230, s. 9.

<sup>60</sup>*Ibid.* ss. 12, 13.

<sup>61</sup>R.S.O. 1970, c. 284.



of the peace and section 85(2) that the list of voters may be procured from the clerk of the peace.

Section 3 of *The Private Sanitaria Act*<sup>62</sup> provides that the clerk of the peace is a member of the board of visitors and that he is the secretary of the board. The oaths of office of the members of the board are to be filed with the clerk of the peace. Section 6 provides for licence fees to be paid to the clerk of the peace and section 7 that the clerk of the peace shall keep all the accounts. Other duties of a similar nature are found in the Act.

Section 15 of *The Summary Convictions Act*<sup>63</sup> is as follows:

Every justice shall forthwith after making a conviction or order or an order of dismissal transmit to the clerk of the peace for the county or district the conviction or order or order of dismissal together with the information, depositions and other papers relating to the case and any recognizances in respect of which proceedings are required to be taken in the court of general sessions of the peace.

Section 6 of *The Bailiffs Act*<sup>64</sup> provides that an application for appointment as a bailiff shall be made to the clerk of the peace in the county in which the applicant intends to carry on business. Section 7 charges the clerk of the peace to examine the applicant and his recommendations are to be sent to the Registrar of Collection Agencies under *The Collection Agencies Act*. Any person who has a complaint against a bailiff may make his complaint to the clerk of the peace in the county for which the bailiff is appointed. The clerk of the peace then investigates the complaint and makes a report to the Registrar.<sup>65</sup>

It can be seen that the duties of clerk of the peace are essentially of an administrative and clerical nature, unrelated to the functions performed by Crown attorneys as agents of the Attorney General. No doubt most of the duties were assigned to Crown attorneys as clerk of the peace as a convenience at a time when many officials in the administration of justice held multiple offices. These functions are not of such a nature as require performance or supervision by officers with the high degree of skill and training which should be possessed by Crown attorneys. It is a misuse of their talents to impose on them routine duties not directly associated with their primary responsibilities.

It was the view of the Crown attorneys who appeared before the Commission that they should be relieved of these duties, and particularly that it was not desirable that the Crown attorney should in any way be engaged in the selection of juries. Although he has no voice in the selection, the fact that he is present at the meetings of the county selectors is open to misunderstanding by the public.

<sup>62</sup>R.S.O. 1970, c. 363.

<sup>63</sup>R.S.O. 1970, c. 450.

<sup>64</sup>R.S.O. 1970, c. 38.

<sup>65</sup>*Ibid.* s. 10 as amended by S.O. 1971, Vol. 2, c. 50, s. 10(6).



Insofar as estreats are concerned, the Crown attorney should represent the Crown on an application for the forfeiture of security for non-appearance of the person bound to appear, but other than that, the duties under the Act such as preparation of the roll of fines and forfeited recognizances may be performed by the clerk or registrar of the appropriate court.

We recommend that most functions of the clerk of the peace be performed by the County Court clerk and that Crown attorneys cease to be *ex officio* clerks of the peace. Under particular statutes where the nature of the subject matter makes it appropriate for the clerk or registrar of another court to perform certain duties, the duties should be specifically imposed on such other officer.

### 5. Other Duties of Crown Attorneys

Appendix III contains a summary of statutes imposing miscellaneous duties on Crown attorneys. Many of these duties are essentially of an administrative and clerical nature and might be performed more appropriately by other officials. For example, the responsibility for employing interpreters at trials and inquests imposed by *The Administration of Justice Act*<sup>66</sup> might be transferred to local court administrators to be performed under the direction of the Provincial Director of Court Administration.<sup>67</sup> Similarly, the authorization for the payment of additional witness fees and fees where no trial takes place under *The Crown Witnesses Act*<sup>68</sup> might be given by an official whose duties are primarily administrative and who reports to the Provincial Director of Court Administration.

Two other statutes impose on Crown attorneys the duties of other full-time officers in the administration of justice when these offices are vacant. *The Judicature Act*<sup>69</sup> constitutes the Crown attorney *pro tempore* local registrar, county court clerk or surrogate registrar where the office is vacant by reason of death, suspension, resignation, retirement or removal where there is no deputy officer to fill the position. *The Sheriffs Act*<sup>70</sup> provides that the Crown attorney is *pro tempore* sheriff when the office becomes vacant and there is no deputy sheriff. It is difficult to see what relief is provided by these enactments even in the case of unexpected vacancies. Crown attorneys are fully occupied performing the essential functions entrusted to them. They have no special knowledge of the operations of offices of local registrars, county court clerks, surrogate registrars or sheriffs which qualify them to perform their duties. In some cases the functions may place Crown attorneys in a position of conflict of interest, for example, if they were required to participate in the jury selection process in the absence of the sheriff who is required to perform an important role. These provisions should be repealed and other provision made.

<sup>66</sup>R.S.O. 1970, c. 6, s. 5.

<sup>67</sup>The creation of this office was recommended in Part I, chapter 2 of this Report. For our recommendations concerning court interpreters see Part III of this Report.

<sup>68</sup>R.S.O. 1970, c. 103 as amended by S.O. 1971, Vol. 2, c. 5.

<sup>69</sup>R.S.O. 1970, c. 228, s. 88(2).

<sup>70</sup>R.S.O. 1970, c. 434, s. 21(2).





### C. STATUS

#### 1. Appointment

*The Crown Attorneys Act* establishes a framework for the appointment and supervision of Crown attorneys in the exercise of their duties. As we have already observed, the Act is not exhaustive of the statutory provisions affecting that office. The Lieutenant Governor in Council may appoint a Crown attorney for each county and each provisional judicial district and such Crown attorneys and assistant Crown attorneys for the Province as he considers necessary. The Crown attorneys and assistant Crown attorneys so appointed are to act anywhere in the Province as directed by the Director of Public Prosecutions.<sup>71</sup> The Lieutenant Governor in Council may also appoint one or more assistant Crown attorneys for any county or provisional judicial district to act under the direction of the Crown attorney.<sup>72</sup> When so acting, such assistant Crown attorneys have the same powers and are to perform the same duties as the Crown attorneys.

In the Judicial District of York, provision is made for the appointment of a Crown attorney, deputy Crown attorney and such assistants as the Lieutenant Governor in Council deems necessary.<sup>73</sup> The deputy and assistants are to act under the direction of the Crown attorney and when so acting have the like duties and powers as the Crown Attorney for the Judicial District of York.<sup>74</sup>

There is a statutory requirement that any officer so appointed and anyone acting in the capacity of Crown attorney or assistant Crown attorney must be a member of the Ontario bar.<sup>75</sup> The appointment of *pro tem* or part-time Crown attorneys will be discussed later.

Both *The Crown Attorneys Act*<sup>76</sup> and *The Public Officers' Fees Act*<sup>77</sup> contemplate that the appointment of Crown attorneys may be on a fee rather than a salary basis. We understand that four Crown attorneys (as set out in Table I, Section D) now hold appointments on a fee basis. In our opinion it is not proper to countenance in the high office of Crown attorney an interest in promoting prosecutions that a fee system tends to create. The provisions regulating appointments on a fee basis should be repealed.

The Crown attorney, who is the agent of the Attorney General for the purposes of the *Criminal Code*, is an employee of the Ministry of the Attorney General, which is organized for the purposes of enabling the Attorney General to carry out the duties and functions of his office.<sup>78</sup>

<sup>71</sup>R.S.O. 1970, c. 101, s. 1. Bill 4 (given first reading March 21, 1973) amending *The Crown Attorneys Act* substitutes Deputy Attorney General for Director of Public Prosecutions, which office ceases to exist.

<sup>72</sup>*Ibid.* s. 2.

<sup>73</sup>*Ibid.* s. 3(1).

<sup>74</sup>*Ibid.* s. 3(2).

<sup>75</sup>*Ibid.* s. 4.

<sup>76</sup>*Ibid.* ss. 7, 14, 16.

<sup>77</sup>R.S.O. 1970, c. 383, s.5.

<sup>78</sup>See *The Ministry of the Attorney General Act*, ss. 3(1), 6 as amended by S.O. 1972, c. 1, s. 9.



Crown attorneys and assistant Crown attorneys are at present appointed to act under the direction of the Director of Public Prosecutions, an employee of the Ministry of the Attorney General with responsibility for supervising and coordinating criminal prosecutions in the Province and the Crown Attorney System.<sup>79</sup> Legislation has been introduced to abolish the office of Director of Public Prosecutions. Replacing it is the office of Director of Crown Attorneys charged with the responsibility for direction of all Crown attorneys and liaison between them and the Ministry of the Attorney General. Advisory and litigation services to Crown attorneys in criminal matters are to be provided by the Senior Crown Counsel in charge of Criminal Appeals and Special Prosecutions.

The statutory provisions governing the status and conditions of employment of Crown attorneys are not to be found in *The Crown Attorneys Act* but in *The Public Service Act*. During their first year of employment assistant Crown attorneys are usually appointed to the probationary staff and may be released by the Deputy Attorney General for failure to meet the requirements of the position.<sup>80</sup> The Crown attorney is asked to assess the assistant's performance and capabilities during the probationary period and to make recommendations to the Deputy Attorney General for permanent appointment.

Permanent positions in the Crown attorney service are classified within the Legal Officer Series, which consists of a range of eight levels established by a legal Positions Evaluation and Classification Committee composed of the Deputy Minister of the Department of Civil Service, the Deputy Attorney General and an Assistant Deputy Attorney General or their respective nominees. A salary grid has been developed within each level. Allocations to the first three levels within the series are the responsibility of the Deputy Attorney General. Allocations to positions above level three are made only on the recommendation of the Deputy Attorney General following evaluation and appraisal of the candidate by the Legal Positions Evaluation and Classification Committee.

The eight levels are as follows:

#### *Legal Officer 1*

An entry level with provision for use as a working level for solicitors who demonstrate they have reached the limit of their potential.

#### *Legal Officer 2*

An entry and working level for employment in the Ontario Civil Service of more experienced solicitors and the level to which solicitors classified as Legal Officer 1 may proceed when they have demonstrated potential for promotion.

<sup>79</sup>Province of Ontario, Manual of Administration, Vol. 1, Supplement to O.C. #12, Department of Justice, [April 1971]. But see Bill 4 (given first reading March 21, 1973) amending *The Crown Attorneys Act* to substitute Deputy Attorney General for Director of Public Prosecutions.

<sup>80</sup>R.S.O. 1970, c. 386, s. 22(5).



*Legal Officer 3*

A senior working level and the level to which solicitors may progress solely on the recommendation of the Deputy Minister on the basis of responsibility and superior performance.

*Legal Officer 4*

A higher working level, allocation to which is dependent upon a favourable review of the position in relation to the classification factors, by the Legal Positions Evaluation and Classification Committee.

*Legal Officer 5*

The first level for senior positions. Progression to this level is achieved only following evaluation and appraisal of the work performed and the professional capabilities of the incumbent by the Legal Positions Evaluation and Classification Committee.

*Legal Officer 6*

The second level for senior positions. Progression to this level is achieved only following evaluation and appraisal of the work performed and the professional capabilities of the incumbent by the Legal Positions Evaluation and Classification Committee.

*Legal Officer 7*

The level to cover senior solicitors, who by reason of the workload and outstanding competence as evaluated by the Legal Positions Evaluation and Classification Committee, justify a differential in compensation above that of Legal Officer 6.

*Legal Officer 8*

Represents the most senior (in terms of ability, status, reputation and contribution) level solicitors in the service of the Government of Ontario. Evaluation of the incumbent for recommendation for allocation to this level will be made by the Legal Positions Evaluation and Classification Committee.

The Legal Officer Series specifically applies to:

- (a) Members of the Law Society of Upper Canada employed as civil servants in the Crown Law Office and other branches, boards and commissions of the Department of Justice in positions such as: Crown Counsel, Crown Solicitor, Crown Attorney, Assistant Crown Attorney, Associate Legislative Counsel, Registrar of Regulations and Law Research Officer.
- (b) Members of the Law Society of Upper Canada employed as civil servants in positions of heads of legal branches, crown counsel and/or solicitor in Ontario government departments and other agencies administered within the provisions of *The Public Service Act*.



Excluded from the series are:

- (a) Judicial and quasi-judicial positions such as: Provincial judges, Masters and members of administrative, investigative and research boards and commissions, etc.
- (b) Positions at the level of Deputy Minister, Assistant Deputy Minister, Executive Director or Senior List positions, whether or not membership in the Law Society of Upper Canada is mandatory in order to hold such position.
- (c) Positions with predominantly administrative responsibilities that may require the interpretation and administration of legislation, the drafting of contracts, leases or other legal documents or the conduct of studies and for which a comprehensive knowledge of law is desirable but not necessarily membership in the Law Society of Upper Canada.

Positions with incumbents who are not members of the Law Society of Upper Canada are excluded from the series.

The structure and allocation considerations are stated to be:

The Legal Officer series consists of eight levels of professional development and responsibility represented by eight classes with eight salary ranges. Allocation to specific levels is based on a process whereby both the work performed and responsibilities assigned plus the personal and professional qualities of the incumbent are evaluated and appraised by the Legal Positions Evaluation and Classification Committee. Following are some of the factors considered by the Committee in classifying positions and incumbents in the series.

(a) *Duties and Responsibilities*

- (i) For legal officers in the Department of Justice [now the Ministry of the Attorney General] the responsibility for directing and supervising the work of other legal officers and the nature, type, level and quality of the work performed.
- (ii) For Crown attorneys, workload, courts served and law enforcement agencies involved and the nature, type, level and quality of the work performed.
- (iii) For legal officers in operating departments, the size of the department, the number of its programs and the nature, type, level and quality of the work performed.

(b) *Personal Qualities*

The degree of:

- (i) ability to recognize and analyze legal problems and provide effective solutions;
- (ii) ability to exercise sound judgment in the advice rendered to the Government in a manner consistent with justice and equity;
- (iii) ability to exercise the judgment necessary to maintain and protect the interests of the Government and the public and at the same time protect the rights of the individual;





- (iv) ability to cooperate with those advised and the ability to secure the cooperation of these persons;
- (v) evidence of dedication to the principles of the administration of justice and the law; and
- (vi) demonstrated understanding and acceptance of the responsibilities of a public servant.

The Committee's brochure on the series contains the following comment with respect to the classified positions:

As can be seen from the foregoing the classification of legal officer positions is a departure from the practice of classifying the job, in that an effort is made to evaluate and appraise the professional responsibilities and capabilities of the individual as well as the work performed and job responsibilities, plus, the individual's contribution first to the department and second to the government.

In practice, the reclassification of assistant Crown attorneys depends substantially on the Crown attorney's evaluation. Regulations under *The Public Service Act* provide for terms of employment and collateral benefits such as pension schemes, vacations, etc.

Under our system of government, the Attorney General occupies an office that has characteristics that do not pertain to that occupied by any other Minister of the Crown insofar as he is responsible for that part of law enforcement which involves the prosecution of offenders. He must administer his office free from political considerations or cabinet control as the Queen's attorney and his decisions must be based on that fact. He is, however, accountable to the Legislature for his decisions.<sup>81</sup>

Every Crown attorney is the agent of the Attorney General for the purposes of the *Criminal Code*. The many other statutory duties imposed on Crown attorneys are incidental to the matters we are discussing in this chapter. We have recommended that many of these duties be assigned to others. We are concerned here only with the status of the Crown attorney in the government service and in the community.

The office held by the Crown attorney is very different from that held by a departmental solicitor and it requires different qualifications. He is a counsel conducting cases in court in our adversary system. He may be pitted against outstanding members of the bar who will draw a fee for a day's work that will be as great as the Crown attorney's salary for a month. The drain put on the physical resources of Crown counsel who is diligent in his work is much greater than on those whose work is done in offices.

It is our view that recognition of the unique position of Crown attorneys in the public service should be reflected in *The Crown Attorneys Act*. That Act or regulations made pursuant thereto should provide for specifications for appointment and advancement in the public service on the basis of work performed and importance in the local context. The range of classification for Crown attorneys and assistant Crown attorneys should be set up independently of the Legal Officer Series and should not be as broad.

<sup>81</sup>For a full discussion of the office of Attorney General see the McRuer Commission Report 931 ff. (Report No. 1 Vol. 2, 1968).



All other provisions of *The Public Service Act* should be reviewed and only those which adequately govern the conditions of employment of Crown attorneys should be retained to supplement *The Crown Attorneys Act*.

## 2. Termination of Employment

Employment may be terminated as a result of political activity or upon reaching compulsory retirement age as provided in *The Public Service Act*. Termination for other cause is authorized as follows:

A Deputy Minister may for cause dismiss from employment in accordance with the Regulations any public servant in his Department.<sup>82</sup>

31. (1) Where a public servant,
  - (a) habitually fails to comply with attendance regulations or directives;
  - (b) absents himself without permission during his prescribed hours of duty;
  - (c) reports for duty while incapable of performing his duties;
  - (d) misuses government property or uses government property or services for purposes other than government business; or
  - (e) fails to obey the instructions of his superior,
 and where, in the opinion of his deputy minister, the circumstances do not amount to cause for removal from employment or dismissal under section 22 of the Act, the deputy minister, or an official of his department who is authorized by him, may, after a hearing, impose a fine equal to not more than five days pay.
- (2) Before dismissing a public servant for cause or removing him from employment for cause, the deputy minister or an official of his department who is authorized by him, shall hold a hearing at which the public servant is entitled to be present and to make representations.<sup>83</sup>

After dismissing a public servant for cause, the Deputy Minister must give to the public servant the reasons for his dismissal and advise him of his right to a hearing by the Public Service Grievance Board.<sup>84</sup>

## D. ASSIGNMENT OF PERSONNEL

### 1. Location of Crown Attorneys and Assistant Crown Attorneys

The following Tables show the number of Crown attorneys and assistant Crown attorneys who are holding appointments in the various counties and districts throughout Ontario as of April 1, 1973 and the classification of all Crown attorneys and assistant Crown attorneys holding appointments as of the same date.

<sup>82</sup>R.S.O. 1970, c. 386, s. 22(3).

<sup>83</sup>R.R.O. 1970, Reg. 749, s. 31(1)(2).

<sup>84</sup>*Ibid.*



**TABLE I**  
**LOCATION OF CROWN ATTORNEYS AND ASSISTANT**  
**CROWN ATTORNEYS**

|                                 | Crown Attorneys | Assistant<br>Crown Attorneys |
|---------------------------------|-----------------|------------------------------|
| Algoma                          | 1               | 2                            |
| Brant                           | 1               | 1                            |
| Bruce                           | 1               | —                            |
| Cochrane                        | 1               | 2                            |
| Dufferin                        | 1*              | —                            |
| Elgin                           | 1               | —                            |
| Essex                           | 1               | 4                            |
| Frontenac                       | 1               | 1                            |
| Grey                            | 1               | —                            |
| Haldimand                       | 1*              | —                            |
| Halton                          | 1               | 1                            |
| Hastings                        | 1               | 1                            |
| Huron                           | 1               | —                            |
| Kenora                          | 1               | 1                            |
| Kent                            | 1               | 1                            |
| Lambton                         | 1               | 1                            |
| Lanark                          | 1               | —                            |
| Leeds & Grenville               | 1               | —                            |
| Lennox & Addington              | 1               | —                            |
| Middlesex                       | 1               | 3                            |
| Muskoka                         | 1               | —                            |
| Niagara North                   | 1               | 1                            |
| Niagara South                   | 1               | 3                            |
| Nipissing                       | 1               | 1                            |
| Norfolk                         | 1               | —                            |
| Northumberland & Durham         | 1               | 1                            |
| Ontario                         | 1               | 1                            |
| Ottawa-Carleton                 | 1               | 6                            |
| Oxford                          | 1*              | 1                            |
| Parry Sound                     | 1               | —                            |
| Peel                            | 1               | 3                            |
| Perth                           | 1               | —                            |
| Peterborough                    | 1               | 1                            |
| Prescott & Russell              | 1*              | —                            |
| Prince Edward                   | 1               | —                            |
| Rainy River                     | 1               | —                            |
| Renfrew                         | 1               | —                            |
| Simcoe                          | 1               | 2                            |
| Stormont, Dundas &<br>Glengarry | 1               | 1                            |
| Sudbury                         | 1               | 4                            |
| Temiskaming                     | 1               | —                            |
| Thunder Bay                     | 1               | 2                            |
| Victoria                        | 1               | 1                            |
| Waterloo                        | 1               | 4                            |
| Wellington                      | 1               | 1                            |
| Wentworth                       | 1               | 4                            |
| York                            | 2               | 33                           |
|                                 | <u>48</u>       | <u>88</u>                    |

\*Appointed on a fee basis.



**TABLE II**  
**CLASSIFICATION AND SALARIES OF ALL CROWN**  
**ATTORNEYS AND ASSISTANT CROWN ATTORNEYS**

|  |          |          |          |          |          |          |          |          |
|--|----------|----------|----------|----------|----------|----------|----------|----------|
| <i>Legal Officer 1</i>                             |          |          |          |          |          |          |          |          |
| \$10,279   | \$10,697 | \$11,114 | \$11,558 | \$12,027 | \$12,497 | \$13,019 | \$13,540 | \$14,349 |
| 4  | 2        | 1        | 5        | 1        | 2        | 1        | -        | -        |
| (All Assistant Crown Attorneys)                    |          |          |          |          |          |          |          |          |
| <i>Legal Officer 2</i>                             |          |          |          |          |          |          |          |          |
| \$14,636   | \$16,149 | \$17,793 | \$20,010 |          |          |          |          |          |
| 9  | 7        | 5        | 6        |          |          |          |          |          |
| (All Assistant Crown Attorneys)                    |          |          |          |          |          |          |          |          |
| <i>Legal Officer 3</i>                             |          |          |          |          |          |          |          |          |
| \$16,228   | \$17,884 | \$20,102 | \$20,493 |          |          |          |          |          |
| 3  | 2        | 2        | 13       |          |          |          |          |          |
| (All Assistant Crown Attorneys)                    |          |          |          |          |          |          |          |          |
| <i>Legal Officer 4</i>                             |          |          |          |          |          |          |          |          |
| \$19,345   | \$20,493 | \$21,732 |          |          |          |          |          |          |
| -  | -        | 10       |          |          |          |          |          |          |
| (All Assistant Crown Attorneys)                    |          |          |          |          |          |          |          |          |
| <i>Legal Officer 5</i>                             |          |          |          |          |          |          |          |          |
| \$21,315   | \$22,580 | \$23,924 |          |          |          |          |          |          |
| 3  | 3        | 22       |          |          |          |          |          |          |
| (15 Crown Attorneys, 13 Assistant Crown Attorneys) |          |          |          |          |          |          |          |          |
| <i>Legal Officer 6</i>                             |          |          |          |          |          |          |          |          |
| \$24,028   | \$25,698 | \$27,498 |          |          |          |          |          |          |
| 1  | -        | 12       |          |          |          |          |          |          |
| (11 Crown Attorneys, 2 Assistant Crown Attorneys)  |          |          |          |          |          |          |          |          |
| <i>Legal Officer 7</i>                             |          |          |          |          |          |          |          |          |
| \$25,698   | \$27,498 | \$29,429 | \$30,029 |          |          |          |          |          |
| -  | 1        | 12       | 1        |          |          |          |          |          |
| (All Crown Attorneys)                              |          |          |          |          |          |          |          |          |
| <i>Legal Officer 8</i>                             |          |          |          |          |          |          |          |          |
| \$27,498   | \$29,429 | \$31,490 |          |          |          |          |          |          |
| -  | -        | 3        |          |          |          |          |          |          |
| (2 Crown Attorneys, 1 Deputy Crown Attorney)       |          |          |          |          |          |          |          |          |
| <i>Crown Attorney for Toronto and York</i>         |          |          |          |          |          |          |          |          |
| \$32,742   |          |          |          |          |          |          |          |          |
| 1  |          |          |          |          |          |          |          |          |

Note: In addition to the above, there are at present four Crown Attorneys on a fee basis, acting in Dufferin, Oxford, Prescott & Russell and Haldimand.

Most of the 88 assistant Crown attorneys were appointed under section 2 of *The Crown Attorneys Act* for the specific county or district in which they prosecute. After the amendment to the Act in 1964 permitting appointments "for the Province", some assistant Crown attorneys were appointed for the Province. Whatever the purpose and intent of this amendment may have been, assistant Crown attorneys whose terms of appointment were province-wide are now, with the exception of a very few, attached permanently to a specific county or district and their assignments do not differ from those of an assistant Crown attorney whose terms of appointment are to a specific area. This is so notwithstanding the authority provided in section 1(2) of the Act for the Director of Public Prosecutions to direct an assistant Crown attorney to act anywhere in the Province.





There has always been a relative amount of voluntary mobility of personnel in the ranks of Crown attorneys and assistant Crown attorneys, and before 1964 where a Crown attorney or assistant Crown attorney prosecuted elsewhere than in the county to which he was appointed he was entitled to be paid on a *per diem* basis of \$20 above and beyond his expenses and salary. This amendment was designed to abolish the *per diem* payment and although it has also the incidental effect of permitting the transfer of Crown attorneys and assistant Crown attorneys alike from county to county, it has not been in fact so used. The basic policy remains of appointing an assistant to a specific locality permanently.

The staffing requirements of Crown attorney's offices present unique problems.

In 1968, Ottawa-Carleton, Kent, Peel, Waterloo, Essex and York all sought the appointment of additional assistant Crown attorneys to relieve the existing staff. It was decided that before the appointments were approved the Advisory Services Division of the Treasury Board should make a study of professional staffing in County Crown attorneys' offices. The Advisory Services Division concluded that the number of assistants authorized for each office should be equivalent to the number of courts in operation so long as some advisory and administrative personnel existed. Of Ottawa-Carleton they wrote:

The amount of time spent on non-court office work is much greater in total than in any other location visited with the exception of York (Toronto). Although it is less than twice the size of Essex (Windsor) in population, total provincial cases handled and criminal cases handled—Carleton has five times the clerical staff. This would seem to result partially from the fact that great care is taken to thoroughly prepare lower as well as higher court cases, prior to hearing. A great deal of clerical work is imposed on this office to effect and control this preparation which in other offices visited was largely left to court or police court liaison officers or was handled just prior to a lower Court session. Clerical control work is handled by four clerks under the direction of an office manager law clerk who also schedules Court appearances for the Assistant Crown Attorneys and part-time Assistant Crown Attorneys.

The preparation of lower Court cases also has an effect on the amount of office work the professional staff undertake. The Assistant Crowns spend a good deal of time on a detailed review of law precedents, discussions with the police, witnesses and the Crown Attorney in preparation for cases.

In short, the preparation and consequent control which is done on a lower court case may approach that for a sessions or assize trial . . .

The Crown Attorney in Carleton operates in a fashion dissimilar to any other office visited. He has his assistants prepare lower court cases in a manner much the same as for the higher court. To allow adequate time for such preparation, Assistant Crown Attorneys are sent into court for not more than five appearances per week. This would seem



to be five half days per week. In practise this time is frequently less than five half days where the individual lower court sittings take less than half a day. As a consequence, part-time assistants must be used frequently to enable the five appearances limit to be observed.

The Advisory Services Division recommended against the appointment of an assistant Crown attorney for Ottawa-Carlton, and for areas where additional courts were being established recommended the appointment of an assistant Crown attorney for each court as it was established. The report also proposed appointments of an assistant to specific locations on the strict understanding that the appointee would serve as and when required in contiguous counties where the pressure of cases there necessitated such a course.

If the Ministry were to implement the recommendations of the Advisory Services Division, the problem of case preparation at the Provincial Court level will remain acute. Some 95% of criminal cases are determined at that level. The quality of the prosecutions in the Provincial Courts will suffer unless thorough case preparation is permitted.

The "one-man, one court" philosophy is simply the antithesis of professional standards. There must be personnel to permit adequate preparation during the work week at courts of all levels. It is also necessary that the Crown attorneys have time to engage in relevant legal research. Finally, allowances in staffing must be made for illness, vacations, and the engagement of assistants on protracted cases. Reliance should not be placed on part-time assistants (to be discussed later) to meet these circumstances which can be projected in advance.

We have come to the conclusion that the Advisory Services Division has based its recommendations on false premises. Unit standards, which might be capable of application to commercial institutions, are not the standards which can suitably be applied in this unique professional context. The efficiency of the criminal courts cannot be measured by the number of cases disposed of apart from the quality of justice dispensed.

We understand that at present staffing is based on a loose formula of 1,000 criminal cases per Crown attorney per year. It is recognized that this criterion is difficult to apply in geographic areas where Crown attorneys are required to devote considerable time travelling between courts and in those areas where they prosecute offences under Acts in addition to the *Criminal Code*.

The need for continuing flexibility in setting the complement of Crown attorneys is apparent. While it is important that guidelines be adopted, they should not be permitted to develop into rigid rules excluding the consideration of individual differences.

## 2. Part-time Crown Attorneys

The assignment and the location of Crown attorneys and assistant Crown attorneys must be considered with reference to part-time assistant Crown attorneys and the duties of the legal staff of the Ministry.



*The Crown Attorneys Act* provides:

When a Crown attorney or an assistant Crown attorney is absent or ill or is unable to perform all his duties, the Deputy Attorney General may appoint a member of the bar of Ontario to act *pro tem* as Crown attorney or assistant Crown attorney, as the case may be, during the period that the Crown attorney or assistant Crown attorney is absent or ill or is unable to perform all his duties.<sup>85</sup>

On any given day a number of part-time assistant Crown attorneys are prosecuting in the Provincial Courts (Criminal Division) throughout the Province. It is departmental policy that a part-time assistant Crown attorney can be paid for his services only in the Provincial Courts, at preliminary inquiries and at inquests. Where the Crown attorney or permanent assistant Crown attorney cannot prosecute at an Assize or in the General Sessions of the Peace or County Court Judges' Criminal Court by reason of the pressure of his other duties or because of absence or illness, a member of the legal staff of the Ministry will often do so.

The appointment of part-time assistant Crown attorneys has been resorted to regularly by the provincial government. As at February 7, 1973, 289 part-time assistant Crown attorneys were available for prosecutions, having been appointed over the years. In the period April 1, 1972 to February 28, 1973, the part-time assistants were paid a total of \$461,688. Of the 289 part-time assistants, 231 conducted prosecutions during this period. Some of them devoted a substantial part of their practice to this work, others devoted only a small portion.

Part-time assistant Crown attorneys are remunerated by authority of Order-in-Council 1750/67 at the rate of \$20 per hour, or a maximum of \$100 per day in the conduct of prosecutions and case preparation.

Table III at page 106 shows the number of part-time appointments made and fees paid from April 1, 1970 to February 28, 1973.

The sums expended on part-time assistants in most instances bears a direct relationship to the density of the population in the county or district. However, in the Judicial District of York, with a population of some 2,000,000, 17 of 23 part-time appointees billed fees of only \$19,685 from April 1, 1972 to the end of February 1973, while in Peterborough, with a population of less than 150,000, 12 of 13 part-time assistants for the same period billed fees of \$36,104.

Some of the less populous counties appear to make inordinate use of the part-time assistant Crown attorney.

The imbalance of fees and salaries paid to part and full-time assistant Crown attorneys respectively has had a demoralizing effect on the permanent staff. What is worse, the part-time assistant Crown attorney may well defend a case on which he has advised the police in his capacity as Crown attorney. Apart from any actual conflict of interest, the appearance of justice is not preserved when the roles of defence and Crown counsel are

<sup>85</sup>R.S.O. 1970, c. 101, s. 5.



**TABLE III**  
**ANALYSIS OF PER DIEM ASSISTANT CROWN**  
**ATTORNEYS' FEES**

| County or District           | No. of Part-Time Appointees as at |              |             | No. Receiving Payments |              |              | Total Payments Made to Part-Time Appointees |                               |                               |
|------------------------------|-----------------------------------|--------------|-------------|------------------------|--------------|--------------|---|-------------------------------|-------------------------------|
|                              | Mar. 15 1971                      | Apr. 10 1972 | Feb. 7 1973 | Mar. 31 1971           | Mar. 31 1972 | Feb. 28 1973 | Apr. 1, 1970 to Mar. 31, 1971               | Apr. 1, 1971 to Mar. 31, 1972 | Apr. 1, 1972 to Feb. 28, 1973 |
| Algoma                       | 2                                 | 2            | 3           | 1                      | 1            | 3            | \$ 5,608                                    | \$ 6,055                      | \$ 14,549                     |
| Brant                        | 2                                 | 2            | 2           | 2                      | 2            | 2            | 3,670                                       | 4,404                         | 152                           |
| Bruce                        | 2                                 | 2            | 2           | 1                      | —            | 1            | 1,188                                       | 2,376                         | 1,010                         |
| Cochrane                     | 1                                 | 1            | 1           | 1                      | 1            | 1            | 14,984                                      | 801                           | 1,192                         |
| Dufferin                     | 2                                 | 2            | 2           | 2                      | 2            | 2            | 1,970                                       | 480                           | 387                           |
| Elgin                        | 3                                 | 3            | 4           | 2                      | 2            | 3            | 5,044                                       | 6,612                         | 9,153                         |
| Essex                        | 8                                 | 8            | 12          | 7                      | 6            | 9            | 10,495                                      | 8,255                         | 6,831                         |
| Frontenac                    | 8                                 | 8            | 9           | 8                      | 8            | 8            | 20,709                                      | 14,657                        | 33,963                        |
| Grey                         | 1                                 | 2            | 2           | 1                      | 1            | 2            | 778   | 1,728                         | 4,097                         |
| Haldimand                    | 1                                 | 1            | 2           | —                      | —            | 2            | —   | —                             | 115                           |
| Halton                       | 9                                 | 9            | 9           | 7                      | 8            | 8            | 6,876                                       | 7,994                         | 13,032                        |
| Hastings                     | 4                                 | 4            | 7           | 4                      | 4            | 6            | 9,657                                       | 5,091                         | 6,800                         |
| Huron                        | 1                                 | 2            | 1           | 1                      | 2            | 1            | 6,244                                       | 1,699                         | 958                           |
| Kenora                       | 1                                 | 2            | 3           | 1                      | 1            | 2            | 2,033                                       | 1,606                         | 9,551                         |
| Kent                         | 4                                 | 3            | 3           | 3                      | 3            | 3            | 6,974                                       | 1,418                         | 1,493                         |
| Lambton                      | 5                                 | 6            | 7           | 4                      | 5            | 7            | 15,638                                      | 20,224                        | 15,819                        |
| Lanark                       | 1                                 | 1            | 1           | 1                      | 1            | 1            | 2,830                                       | 2,266                         | 1,566                         |
| Leeds & Grenville            | 8                                 | 8            | 8           | 5                      | 5            | 6            | 13,297                                      | 13,370                        | 17,699                        |
| Lennox & Addington           | —                                 | —            | 1           | —                      | —            | 1            | —   | 106                           | 638                           |
| Lincoln (Niagara North)      | 8                                 | 7            | 7           | 5                      | 6            | 7            | 7,567                                       | 4,060                         | 4,920                         |
| Manitoulin                   | —                                 | —            | —           | —                      | —            | —            | —   | —                             | —                             |
| Middlesex                    | 16                                | 16           | 17          | 10                     | 8            | 12           | 27,002                                      | 20,684                        | 32,950                        |
| Muskoka                      | 1                                 | 2            | 2           | 1                      | 1            | —            | 73  | 109                           | —                             |
| Nipissing                    | 3                                 | 4            | 4           | 1                      | 2            | 3            | 6,480                                       | 12,880                        | 7,074                         |
| Norfolk                      | 4                                 | 6            | 5           | 3                      | 3            | 4            | 5,758                                       | 1,611                         | 1,686                         |
| Northumberland & Durham      | 5                                 | 5            | 5           | 5                      | 3            | 5            | 1,802                                       | 1,682                         | 2,215                         |
| Ontario                      | 5                                 | 5            | 8           | 3                      | 3            | 6            | 7,534                                       | 7,539                         | 10,114                        |
| Ottawa-Carleton              | 8                                 | 10           | 15          | 8                      | 10           | 14           | 41,850                                      | 57,428                        | 66,775                        |
| Oxford                       | 6                                 | 6            | 5           | 2                      | 2            | 2            | 433   | —                             | 444                           |
| Parry Sound                  | 1                                 | 1            | 2           | —                      | —            | —            | —   | —                             | —                             |
| Peel                         | 7                                 | 9            | 10          | 6                      | 8            | 9            | 17,997                                      | 25,659                        | 35,886                        |
| Perth                        | 2                                 | 2            | 2           | 2                      | 2            | 2            | 2,732                                       | 2,391                         | 4,546                         |
| Peterborough                 | 10                                | 11           | 13          | 9                      | 6            | 12           | 20,832                                      | 29,427                        | 36,104                        |
| Prescott & Russell           | —                                 | —            | —           | —                      | —            | —            | —   | —                             | —                             |
| Prince Edward                | —                                 | —            | —           | —                      | —            | —            | —   | 264                           | —                             |
| Rainy River                  | 1                                 | 1            | 2           | 1                      | 1            | 2            | 836   | 250                           | 531                           |
| Renfrew                      | 3                                 | 3            | 2           | 1                      | 1            | 1            | 1,169                                       | 2,707                         | 5,612                         |
| Simcoe                       | 17                                | 16           | 18          | 8                      | 7            | 13           | 5,278                                       | 4,576                         | 6,236                         |
| Stormont, Dundas & Glengarry | 3                                 | 4            | 5           | 3                      | 3            | 5            | 6,874                                       | 3,393                         | 9,531                         |
| Sudbury                      | 18                                | 17           | 19          | 8                      | 7            | 11           | 4,103                                       | 6,179                         | 8,360                         |
| Timiskaming                  | 5                                 | 5            | 5           | 2                      | 2            | 2            | 390   | 1,884                         | 2,092                         |
| Thunder Bay                  | 4                                 | 4            | 6           | 3                      | 3            | 6            | 5,666                                       | 7,297                         | 10,476                        |
| Victoria & Haliburton        | 3                                 | 4            | 4           | 2                      | 2            | 3            | 1,734                                       | 1,560                         | 2,663                         |
| Waterloo                     | 7                                 | 8            | 9           | 2                      | 4            | 7            | 1,609                                       | 4,551                         | 1,557                         |
| Welland (Niagara South)      | 5                                 | 4            | 3           | 2                      | 2            | 2            | 2,965                                       | 1,307                         | 670                           |
| Wellington                   | 4                                 | 2            | 3           | 3                      | 2            | 3            | 5,473                                       | 4,469                         | 1,096                         |
| Wentworth                    | 17                                | 14           | 16          | 11                     | 9            | 12           | 55,248                                      | 48,294                        | 51,460                        |
| York-Toronto                 | 19                                | 20           | 23          | 10                     | 13           | 17           | 18,900                                      | 6,913                         | 19,685                        |
| <b>TOTALS</b>                | <u>245</u>                        | <u>252</u>   | <u>289</u>  | <u>162</u>             | <u>162</u>   | <u>231</u>   | <u>\$378,310</u>                            | <u>\$356,256</u>              | <u>\$461,688</u>              |

so closely intermingled. It is a totally unsatisfactory situation that a part-time assistant Crown attorney or a partner in his law firm may act in a civil case arising out of the same incident as a criminal case on which he acted or gave advice in his capacity as part-time Crown attorney.

The potential for abuse inherent in the system is recognized in relation to full-time Crown attorneys and assistant Crown attorneys in *The Crown Attorneys Act*.

- (1) No Crown attorney or assistant Crown attorney shall, by himself or through any partner in the practice of law, act or be directly or indirectly concerned as counsel or solicitor for any person in





respect of any offence charged against such person under the laws in force in Ontario.

- (2) *Subsection 1 does not apply to part-time assistant Crown attorneys.*<sup>86</sup>

The Crown attorney, as the local representative of the Attorney General, has an office of such importance in the administration of justice that it should not under most circumstances include a part-time officer. The potential for abuse is recognized by statute in relation to permanent officers and yet is open for part-time officers.

The employment of part-time assistants is not economical nor can its effect on morale ultimately lead to an enhancement of the status of the permanent official.

We recommend that a completely fresh approach be taken to the use of part-time assistant Crown attorneys. Part-time appointments should not be considered an acceptable substitute for permanent appointments. Permanent appointments should be made without delay to those counties and districts where the workload, both in and out of court, so warrants. In determining the need for the additional appointments, allowance should be made for vacations, predictable illness, and a policy of rotation of personnel to neighbouring counties or districts to equalize workloads. Our recommendations for the use of law clerks, students-at-law and retired police officers in summary conviction prosecutions are relevant in this context.

The use of part-time assistants should be reserved for unusual circumstances of a temporary nature, as when an Assize and County Court Judges' Criminal Court are scheduled to sit on the same day and there is no permanent official available to replace the full-time appointees in the conduct of prosecutions in the Provincial Courts. It should be made clear that it is improper for a part-time appointee when acting in that capacity to engage in the defence of criminal cases, and for him to act at any time directly or indirectly in a civil case arising out of the same incident as any criminal case in which he acted or gave advice as a part-time assistant Crown attorney.

### 3. Regional Organization

Crown attorneys are organized on an informal eight region basis as shown in Appendix IV. Each region has a chairman and secretary elected by the Crown attorneys in the region. The chairman is responsible for receiving the work schedules of Crown attorneys in the region and arranging for the assignment of personnel from one county to another in the region in order to equalize workloads. *Per diem* assistant Crown attorneys are supervised by the regional chairman.

While we are opposed to any changes in the appointment of Crown attorneys and their assistants to each county and district, we approve this

<sup>86</sup>*Ibid.* s. 10(1). Emphasis added.



method of ensuring mobility and alleviating imbalances in workloads. It would have the effect of further reducing the need for *per diem* appointments.

#### 4. *Police as Prosecutors*

It has long been the practice for senior police officers to act as prosecutors at the trial of certain summary conviction offences coming before the Provincial Courts. These cases mainly involve such matters as breaches of municipal by-laws and *The Highway Traffic Act* and in some areas breaches of *The Game and Fish Act*.

Representations were made to us on behalf of the Ontario Association of Chiefs of Police that police officers should be relieved of all duties of prosecuting offences. In their brief they put it this way:

While this activity is usually restricted to offences constituting a breach of Provincial Statutes or a Municipal By-law, and notwithstanding the fact that Section 47 Part IV of the Police Act of Ontario includes the prosecuting and aiding in the prosecuting of offenders in defining a police officer's duties, it is just as unacceptable as if it were the prosecution of criminal offences for like reasons, only more emphatically so, than those as stated in paragraph 1. In addition, it is highly unrealistic to expect a police officer, acting as a prosecutor, to demonstrate the same degree of impartiality in a case where the credibility of a fellow police officer is contested, as would be expected from a member of the Crown Attorney's staff. Perhaps more to the point, and at the risk of being repetitive, it is even more unrealistic to expect such procedures to be conducive to establishing public confidence in the courts or the police. It is difficult to understand why a procedure that is not practiced in the higher courts should be considered acceptable in courts at a lower level.

Others appearing before the Commission supported this submission.

We have not had any complaints that the police officers who perform these duties have been unfair or inefficient but many views have been expressed that the practice is undesirable in principle and creates distrust of the legal process in the minds of the public. In courts where the main witnesses are police officers and prosecutions are conducted by senior police officers, there is a natural inclination to conclude that the courts are police dominated. Under the present practice, it is inevitable that the system should be open to such interpretation. We have come to the conclusion that other means must be found for the prosecution of minor summary conviction offences. From recent announcements by the Attorney General, it would appear that he shares this view and that programmes are being prepared for gradual implementation to replace police as prosecutors.

Different solutions to the problem have been proposed to us. In the first place, all prosecutions should be under the direction and supervision of the Crown attorney. It would not be reasonable or realistic to require men or women with the qualifications necessary to be good Crown at-



torneys to devote a substantial part of their time to prosecuting summary conviction offences. That would be an inefficient use of qualified manpower. It may be that of the alternatives for the present practice which have been suggested some are suited to the conditions in certain areas of the Province and others are more suited to other areas. We consider three possible alternatives.

(a) *Law Clerks*

The use of law clerks in the legal profession has undergone considerable development in Ontario in recent years. Law Clerks, properly trained and attached to the Crown attorney's office could fulfill a most useful role. Specialized training of the sort necessary to fit interested applicants to perform these duties might be included in the curriculum of the community colleges. The course of study might be prescribed by the Ministry of the Attorney General in consultation with the Crown Attorneys' Association. It has been suggested that the Crown Attorneys School discussed below, provide forensic training for certified law clerks. We are not in a position to assess whether this would be a satisfactory substitute.

(b) *Retired Police Officers*

It may be possible to develop a corps of retired police officers who have had experience in prosecuting summary conviction offences who would act under the direction of the Crown attorney. This would not provide a permanent solution.

(c) *Students-at-Law*

In some Crown attorneys' offices, particularly Carleton and Frontenac, some law students have been employed during the summer months of their academic years and a few students-at-law have served their articles under the Crown attorney. While the Ministry of the Attorney General has made it a practice over the years to have articled students on its legal staff, it has not encouraged such a policy in the Crown attorneys' offices.

The increased use of articled students employed by the Crown attorney for summary conviction prosecutions deserves consideration. If a student proposes a career as a Crown attorney upon graduation such employment would enable him to acquire experience in the actual conduct of trials. The only serious drawback to the exclusive use of students-at-law in this capacity would be a want of continuity and a satisfactory supply. In the first three years of law school enrolment, his employment would be limited to the summer months only. In the articling period prior to entry into the Bar Admission Course, he would be available for one year. Whether or not he pursued a career within the Crown attorney's office upon graduation from the teaching portion of the Bar Admission Course, there would be a constant turnover in student prosecutors and a resulting want of continuity.

This source of supply must also be considered in the light of the MacKinnon Committee's Report on Legal Education to the Law Society.



The Committee's recommendation for the abolition of the articling period will be reconsidered by the Benchers later this year.

#### E. INSTRUCTION BRIEFS AND DISCLOSURE

##### 1. *Preparation for Trial*

###### (a) *Provincial Courts (Criminal Division)*

In the larger metropolitan areas the Provincial Courts sit five days a week. Some of these courts sit through until late in the afternoon, while others may complete their work by noon. The courts do not sit exclusively in county towns but sit in various centres throughout the counties. Some sit as often as two or three times a week, some may sit bi-monthly. In northern Ontario as many as three of these courts may sit in one day with the Crown attorney and Provincial judge travelling long distances between courts.

In the large cities, Windsor, London, Hamilton, Toronto and Ottawa, the usual practice is for the Crown attorney to familiarize himself with the cases for the day during the period before court convenes. Usually there is a police officer of senior rank who acts as court officer on a permanent basis for the specific Provincial Court and is responsible for the brief for the Crown attorney. He advises the Crown attorney as to what cases are to be adjourned, proceeded with, withdrawn or those in which pleas of guilty are expected and the reasons therefor.

With exceptionally heavy court dockets in the metropolitan areas it is difficult for an inexperienced assistant Crown attorney to prepare a case adequately or to advise the police on the preparation of a case within the time available before the court commences. It has been the practice generally throughout the Province for the police to communicate with the assistant Crown attorney assigned to a given court well in advance of the trial date if the case is complex or presents unusual problems. In ordinary cases, however, instruction briefs are not, as a general rule, received from the police until the day of the trial and it becomes impossible to overcome any evidentiary defects which are then apparent, short of requesting adjournments.

Crown attorneys have a statutory duty to cause charges to be investigated further and to have additional evidence collected where necessary in order to prevent prosecutions from being delayed unnecessarily or failing through want of proof.<sup>87</sup> They will be unable to discharge this duty if they are not made aware of the Crown's case in advance of the day of trial. Adjournments at the time of trial to permit further preparation cannot be and should not be capable of being secured as a matter of course. Requests for adjournments cause inconvenience to witnesses and accused persons and should be rare in a system which is functioning properly. We recommend that the Provincial Director of Court Administration take immediate steps to develop systems for ensuring that Crown attorneys receive ade-

<sup>87</sup>*Ibid.* s. 12(a).







quate information for trial preparation. We make specific recommendations below for the appointment of an instructing Crown attorney at the "Old City Hall" in Toronto, where the problems of preparation appear to be most acute.

*Problems Peculiar to Northern Ontario*

Although prosecutions in the District Courts and Supreme Court present no problem in northern Ontario, preparation in the Provincial Courts is particularly difficult. Taking Thunder Bay as an example, courts will be held at Schreiber, Terrace Bay and Manitowadge on one day every two weeks. Every two weeks courts are held at Nipigon and Geraldton on the same day. Once a month, weather permitting, the court sits at Armstrong. These towns are located at least 125 miles from Thunder Bay and in some cases, over 125 miles from each other. Briefs could be mailed by the Ontario Provincial Police detachments to the courthouse at Thunder Bay and in cases of importance they are. In the majority of instances, however, the Crown attorney or his assistant sees the "confidential instructions" (popularly known as "dope sheets") only upon his arrival at the court.

The lists in these towns are not long, but as the court sits only once every two or three weeks, advice is sought from the Crown attorney when he arrives by members of the public and police alike. Accordingly, the opportunities for case preparation are as inadequate as in the larger cities. If a case must be adjourned for want of evidence, sometimes a genuine injustice may occur, as the witnesses and counsel may have come long distances. This problem is not peculiar to Thunder Bay. It exists throughout northern Ontario. In developing systems for ensuring information flow to Crown attorneys, the Provincial Director of Court Administration should have special regard to the problems unique to the north.

*(b) County Court Judges' Criminal Courts and General Sessions of the Peace*

We are advised that an administrator in the Toronto Crown attorneys office can delegate a case to an assistant for prosecution with ample time for preparation in the General Sessions of the Peace and in the County Court Judges' Criminal Court. So far as is known, elsewhere in the Province, including northern Ontario, there is sufficient time to prepare cases in these courts.

*(c) The Supreme Court of Ontario*

Throughout Ontario there has always been a sufficient time to prepare cases for trial in the Supreme Court. The experience of judges of the Supreme Court has been that too often Crown attorneys are assigned to prosecute in serious and difficult cases when they have neither the ability nor experience for the task. In the civil law it is common practice to retain particularly able counsel to present difficult cases. This practice should be equally true in the field of criminal law. Where a case involves difficult questions of law and evidence and entails a particularly difficult marshalling of the facts so that the case may be presented with clarity, experienced and skilful Crown counsel should be specially appointed. Such



counsel will usually be available among Crown attorneys. In proper cases, a less experienced Crown attorney or assistant Crown attorney should be appointed to assist. This is the best form of training for young assistant Crown attorneys.

## *2. Coordination of the Flow of Information before Trial*

### *(a) Provincial Courts (Criminal Division)*

It has been suggested to us that the root of the problem where there is lack of preparedness for trial lies with the police. First, it is said, there is a disinclination to send instruction briefs by mail lest they be lost. In some cases this may be valid but the problem would not appear to be insurmountable. It has also been suggested that some police officers are reluctant to disclose the Crown's case too far in advance of the hearing. If this does constitute a problem, we believe that it is one that can best be resolved by departmental discussion between the responsible Ministries.

In our view a more serious problem is presented with respect to disclosure to defence counsel.

At present, in Toronto, the Crown attorneys acting at "Old City Hall" often do not see the confidential instructions until the morning on which the related cases are scheduled. As a result, when the Crown attorney arrives, usually at about 9:15 or 9:30 a.m., a number of defence counsel will be waiting to talk to him about their cases. Others may try to confer with him in the courtroom or in the hallway prior to the opening of court or during adjournments.

Discussion at the remand stage is generally perfunctory as the information available to the Crown attorney is very limited. If defence counsel must wait until the time of trial for disclosure of the Crown's case, there is a danger that trials will be set unnecessarily pending receipt of the confidential instructions by the Crown attorney. On the other hand, there is a reluctance on the part of the police to prepare detailed statements of the evidence of witnesses unless it will be required by the Crown attorney at trial.

The coordination of Crown attorney services was the subject of Report in 1969 by the Advisory Services Division of the Treasury Board referred to above. Of the York County Crown Attorney's office it was said:

This office functions as efficiently as it does particularly because of police cooperation in the administration of the lower Courts and assistance in procedural work within the Crown Attorneys office.

The Crown Attorney has on his staff, an inspector seconded from the Metropolitan Toronto Police Force who acts as an administrative and liaison officer and this highly capable individual supervises the clerical office staff in the execution of office procedures, schedules the rotational assignments for Assistant Crowns plus cover off during illness and vacation, handles the liaison with the police on all routine court



matters and acts as supervisor for the police detective sergeants who are assigned to each of the lower criminal courts. These latter officers do much of the preparation for the Assistant Crown Attorneys prior to the opening of courts, such as reviewing the court docket, noting attendance of witnesses, reviewing the Crown's "dope sheet" and the myriad of petty details which could reduce the court efficiency if they were not attended to expeditiously. The Assistant Crowns are able to proceed with prosecution advocacy with the greatest despatch.

The Crown Attorneys organization in York could well serve as a model for other county offices as they grow in size.

The experience in York, however, did not prove satisfactory. We have been told that the office staff resented being supervised by a police inspector and that the Crown attorneys were embittered by the authority of the police inspector over them. They ascribed their difficulties in securing confidential instructions for the preparation of cases in advance of trial to police intrusion in their proper domain. This is but another example of an administrative accommodation adopted for reasons of expediency without adequate regard for matters of principle.

In 1970, the arrangement with the Metropolitan Toronto Police Force whereby the Inspector was seconded to the office of the Crown attorney was terminated. Supervision of the clerical staff was then delegated by the Crown attorney to a senior clerk. Non-professional administrative and liaison functions were assumed by a civilian coordinator. Police liaison fell to an experienced court officer.

Court assignments and emergency replacements in cases of sickness, vacation and overlapping of court assignments became the responsibility of the deputy Crown attorney and a full-time administrative senior assistant Crown attorney respectively. Liaison work with the police on routine court matters, such as the day-to-day scheduling of court officers for the Provincial Courts, the obtaining of judges' signatures to bring prisoners from custodial institutions to the courthouse as witnesses, the receiving of confidential instructions in advance of trial dates and the extensive communication with police sources became the responsibilities of a police inspector.

The Commission recommends that these arrangements be regularized in Toronto under an instructing Crown attorney to be assigned to the Provincial Court (Criminal Division) in Metropolitan Toronto. He should have no court duties during this assignment but should be responsible for the establishment and maintenance of the information flow between the police and Crown attorneys with respect to cases in this court. He should also establish and supervise a system of disclosure with defence counsel. Finally, under the direction of the Crown Attorney and Deputy Crown Attorney he should have responsibility concerning the assignment of Crown attorneys in the Provincial Court and should be in regular and close contact with the administrative clerk in that connection.

We recommend that the instructing Crown attorney be located at "Old City Hall" until our recommendations for decentralization made in





the previous chapter are implemented. (Following decentralization there should be an instructing Crown attorney for each of the new courthouses.) He should have adequate secretarial and clerical staff. In addition, at least three other assistant Crown attorneys should be assigned to assist him in carrying out his functions. While one of them might occasionally relieve in a particular courtroom in an emergency, they should be assigned primarily to the instructing Crown attorney's office for lengthy periods at a time. In the previous chapter we made recommendations for the assignment of four extra assistant Crown attorneys to "Old City Hall".

In establishing information flow from the police, clear procedures should be laid down. The minimum requirements for a first appearance should be that information which is necessary to allow the Crown attorney to deal with a show cause hearing or speak to sentence on a guilty plea. Where a trial is to take place, there must be information sufficient for the Crown attorney to conduct the prosecution. If complicated facts or questions of law are involved the Crown attorney should be informed well in advance.

Where there is a request from defence counsel for disclosure more complete information should be required. The instructing Crown attorney and his staff should be available in his office and accessible both personally and by telephone. As a precaution, defence counsel requesting disclosure may be required to give written evidence of their retainer.

Our recommendations concerning disclosure apply equally to all areas of the Province. It should be the responsibility of the Crown attorney in each county or district to develop and supervise proper systems. With a fair and efficient system of disclosure, trial dates can be set or guilty pleas entered at an early stage in the proceedings.

(b) *County Court Judges' Criminal Courts and General Sessions of the Peace*<sup>87a</sup>

The responsibility for coordination for the County Court Judges' Criminal Court and General Sessions of the Peace for the Judicial District of York lies largely with the "civilian" coordinator mentioned earlier. The coordinator was formerly a court clerk attached to the office of the clerk of the peace. His duties are to receive the confidential instructions after a bill has been returned by the grand jury or after committal for trial in the County Court Judges' Criminal Court and to handle at every stage all enquiries in relation to the cases from police and other witnesses, counsel, accused and other interested persons. In consultation with a senior assistant Crown attorney he assigns and distributes the cases to the assistant Crown attorneys appearing at trial. Matters of a professional nature are entirely in the hands of the assistants involved at the grand jury or at trial.

The coordinator acts as clerk of the Assignment Court established in 1969 and described in Part I, chapter 10, of this Report. The Court sets

<sup>87a</sup>In chapter 5, Part I, we recommended that the County and District Courts, County (or District) Court Judges' Criminal Courts and General Sessions of the Peace be reconstituted as a single court of record with only one name.





trial dates on the application of the Crown attorney and upon notice to the accused and his counsel when a mutually satisfactory date cannot be arrived at by the coordinator and the defence counsel. Where a case has already been set for trial, the Court is the forum at which any adjournment is sought. He notes the dates, keeps a record of available dates, keeps a record of proceedings at previous Assignment Courts if no court reporter is present and if the case in question has not been assigned to an assistant Crown attorney arranges for an assignment in consultation with a senior Crown attorney.

The coordinator is responsible for all non-professional aspects of the cases in the higher courts. He consults frequently with the senior County Court judge and the trial coordinator in the County Court regarding lengthy cases and the availability of judges to hear them.

We are advised that this method of coordination has been found to be eminently satisfactory in Toronto. It has been especially valuable in effecting court control in relation to prisoners in custody. Immediately upon the return of a bill from the grand jury or upon receipt of the County Court Judges' Criminal Court confidential instructions, the coordinator attempts to arrange with counsel an early trial date for those in custody. Failing agreement, the case is placed on the first available Assignment Court list where the Court can assume control of it. It is unusual for an accused to spend more than six weeks in custody once the coordinator has received the Crown brief.

We recommend for consideration the adoption of the coordinator system in large urban centres outside the Judicial District of York.

#### F. EDUCATION AND TRAINING OF CROWN ATTORNEYS

##### *1. Opportunities for Education and Training Before Entering the Office of Crown Attorney*

Elementary courses in criminal law in the law schools in Ontario may incidentally allude to the office of Crown attorney but they do not provide specific academic content concerning the nature and function of his office.

The Criminal Procedure studies in the Bar Admission Course were for many years defence oriented. Recently the imbalance has been redressed somewhat by including as lecturers in the course an assistant Crown attorney from the Judicial District of York and two members of the legal staff of the Ministry of the Attorney General. The Crown Attorney for the Judicial District of York gives an annual lecture of one hour's duration outlining the nature of the office and some of its practical aspects.

It has been pointed out that it is not the general practice of the Ministry of the Attorney General to have students-at-law serve their articles under Crown attorneys in the counties and districts throughout the Province. The result is that few graduates from the law schools and the Bar



Admission Course have any practical knowledge of or appreciation of the functions of the Crown attorney.

## 2. *In-Service Training*

When a recently graduated barrister is recruited into a Crown attorney's office it is difficult to know whether he is intent upon the unique career on which he is about to embark or is merely seeking an opportunity to get experience in court. There are no formal educational or training programmes immediately available. As a general rule, each office has its own in-service training programme.

In the Judicial District of York, for example, the new assistant spends his first week becoming oriented to the surroundings and becoming familiar with the process of Crown briefing. He meets the personnel attached to the courts in which he will be appearing; examines the confidential instructions for Crown counsel, informations and bail bonds; studies the provisions of *The Crown Attorneys Act*; and observes police discussions with the Crown attorney in the period before court convenes.

Following his week of "orientation", the assistant spends one to two weeks observing the Crown attorney, or a senior assistant Crown attorney, in the actual prosecution of cases in the Provincial Courts. The new assistant accompanies the Crown attorney throughout the day, which usually begins with a morning conference with the Court officer (a police officer attached to the courts) before the appearance in court. Following the closing of court he may discuss with him any problems which have arisen.

Although variations in the type of initial training exist throughout the Province, usually two to four weeks after his appointment the assistant prosecutes cases. His first assignments will be in the Provincial Courts, and in the larger counties, in the courts hearing driving offences. As he gains experience and proficiency in the actual conduct of trials he progresses to other courts.

In Toronto, the assistant may well commence prosecuting at the Assize within five to six years of his appointment and, depending upon his ability, dedication and industry, conduct prosecutions before the County Court judge within a year of his appointment. In the smaller counties these periods are greatly reduced.

Experience gained in the day-to-day conduct of criminal trials and in the preparation for these trials customarily has been considered the only effective training for a Crown prosecutor. It is said that advocacy cannot be developed or the application of techniques mastered in any other way.

In our view the day-to-day contact with the trial of criminal cases does not in itself provide sufficient opportunity for the development of a philosophical appreciation of the role and function of the Crown attorney. There is little scope for learning new techniques, or scientific methods of proof, or for a comprehensive understanding of the basic principles of



criminal law as they apply to new social conditions and issues. It is essential to a good Crown attorney that he be exposed to this type of information.

In the early 1960's the late Henry H. Bull, Q.C., Crown Attorney for Metropolitan Toronto and York County and S. A. Caldbick, Q.C., the senior advisory Crown Attorney for the Province, with the concurrence of W. C. Bowman, Q.C., the Provincial Director of Public Prosecutions, inaugurated a programme of bringing assistants from the county units to Toronto for periods ranging from one to three months to acquire a broader base of experience by prosecuting at all criminal courts, except the Supreme Court of Ontario. This experiment lasted for approximately four years.

### 3. *Regional Meetings of Crown Attorneys*

Early in the 1960's Mr. Caldbick was instrumental in developing informal, localized regional meetings of Crown attorneys. The Province was divided into regions as set out in Appendix IV in which there was a mutuality of concern. The Crown attorneys from within these areas met on a more or less regular basis for the purpose of discussion and the exchange of ideas and viewpoints.

A system was devised by Mr. Caldbick for circulating the minutes of regional meetings to each Crown attorney in the Province. However, some of the regions have not been as active as others and some, such as Toronto, conducted meetings primarily of an internal administrative nature, and of little interest to Crown attorneys elsewhere.

We understand that the regional meetings are to be given fresh impetus under the recently appointed Director of Crown Attorneys. Meetings will be held at least four times a year at which designated topics will be discussed. Representatives of each region will then meet with the Director with a view to developing policies on matters of general concern.

### 4. *Meetings of the Crown Attorneys' Association*

A plenary annual meeting of the Crown Attorneys' Association is held in the spring of each year.<sup>87b</sup> The annual meeting, which lasts at least three days, affords an opportunity for a formal and informal interchange of views, and comparison of experiences by members from diverse areas of the Province. Some uniformity in procedures and standards may result.

During the last 10 years the fall executive meeting of the Association has taken the form of an educational seminar for all members of the Association. The seminar is of two days' duration. At the 1971 meeting, the *Bail Reform Act* and psychiatric evidence were the subjects on the agenda. The 1964 seminar was devoted exclusively to bankruptcy and commercial fraud.

The constitution of the Crown Attorneys' Association also provides for special general meetings. In 1969, a special educational seminar was

<sup>87b</sup>The constitution of the Crown Attorneys' Association appears in Appendix V.



convened to consider the effect of the omnibus bill amending the *Criminal Code*.

### 5. *The Crown Attorneys' School*

While the regional and Association meetings are beneficial in terms of continuing education, by the mid-sixties it was recognized within the Association that such meetings were unable to provide either an adequate educational base, both theoretical and practical, for the inexperienced assistant Crown attorney, or the intensive advanced base for the experienced Crown attorney and his assistants. The Association with encouragement and financial assistance from the then Department of Justice, established a Crown Attorneys' School with two courses each of one week's duration in August of each year. A description of the operations of the school and, for comparative purposes, of the proceedings of the National College of District Attorneys at the University of Houston in Texas is contained in Appendix VI. The school is held at Massey College in Toronto. Attendance is compulsory for all new appointees.

Apart from the provision of the facilities referred to, the Ministry has in the past placed no emphasis on professional development. Library facilities for some Crown attorneys and their assistants are inadequate. We are told that in the late 1960's, a copy of Tremear's *Criminal Code* and Phipson on Evidence were deemed to be the only legal texts required by an assistant Crown attorney for the discharge of his duties. A Crown attorney may have a number of basic textbooks and a subscription to the *Canadian Criminal Cases*, but little regard is had to the number of assistants who must use them. In Toronto, for example, the Crown attorney, the deputy Crown attorney and 33 assistant Crown attorneys have been required to share three sets of the *Canadian Criminal Cases*. Those who have had experience in presenting and arguing cases in court know how important it is to have the essential authorities readily at hand. It is a sheer waste of valuable time to have Crown attorneys queuing up for essential books. These are elementary "tools of his trade" and he cannot function efficiently without them.

### 6. *An Information Service for Crown Attorneys*

In January 1973, an official information service was created as an adjunct to the office of Director of Crown Attorneys discussed earlier in this chapter. The service developed out of an unofficial service provided by one of the assistant Crown attorneys in the Judicial District of York. He reproduced and circulated reasons for judgment, together with research papers, articles from legal periodicals and memoranda of law on various topics. In May 1972, he instituted a monthly Crown Attorneys' Newsletter.

It is envisaged that the formal constitution of the office within the Ministry of the Attorney General will create a central clearinghouse for information on many relevant aspects of Crown attorneys' functions. It will be responsible for circulating to Crown attorneys statutes as they are





passed, relevant regulations, and reported decisions from many jurisdictions. Current problems will be discussed in circulars distributed periodically.

The information officer will continue to engage in the conduct of prosecutions to a limited extent, but will devote most of his time to the operations of the information service. It is anticipated that priority will be given to producing a looseleaf Crown Attorney's Manual and an instruction manual for new appointees.

It is to be hoped that the establishment of this office under the Director of Crown Attorneys will be a continuing contribution to the education and development of Crown attorneys who will be leaders of the bar in their respective communities. The experience in the past has been that Crown attorneys have not always had sufficient advance guidance affecting the conduct of their office.<sup>88</sup>

As a complement to the strengthening of the information service, we recommend that the facilities of the Crown Attorneys' School be extended. It should offer expanded courses of longer duration and should receive the financial support necessary to encourage extensive study and research.

#### G. PLEA NEGOTIATION

The subject of plea discussions (often referred to as "plea bargains" or "plea bargaining") has been much debated. It is not a recent phenomenon, but with the large volume of criminal cases reaching the courts a problem of serious proportions has developed in this Province. This has been exacerbated by an infiltration from the United States of what we regard as an unhealthy philosophy quite alien to our concept of an open, fair and public administration of justice. In some jurisdictions in the United States plea discussions have been institutionalized as an accepted part of the pre-trial court proceedings. In others, they remain formally unacknowledged and without judicial sanction.

The subject must be considered with a clear vision of the rule of law and the necessity for maintaining respect for the administration of the criminal law if it is to be an effective instrument in regulating society. Plea bargaining owes its existence to the necessity of disposing of a volume of cases without lengthy delays. An attempt is made by some to rationalize a system of inducing pleas of guilty to expedite the disposition rate in overloaded court dockets. When resources prove inadequate for the orderly processing of criminal cases, justifications for plea negotiations are most

<sup>88</sup>We are advised, for example, that when *The Residential Property Tax Reduction Act, 1968* (S.O. 1968, c. 118, in force January 1, 1969. Now repealed and superseded by S.O. 1972, c. 65) was introduced, few if any Crown attorneys were aware that it contained a provision for penal sanctions for the withholding of rental rebates. No guidance on the administration of the statute was provided to Crown attorneys. Similarly, the introduction of the new bail reform legislation in 1971 presented problems of administration for which the Crown attorneys had not been prepared.



vigorously advanced.<sup>89</sup> There should be no room in the administration of the criminal law for such a doctrine of expediency.

The subject ranges all the way from a consideration of the discretion vested in the Crown attorney to determine what charges should be proceeded with in a particular case, to a bargain made with the accused or his counsel that a plea of guilty will be entered if the accused is assured he will get a minimum sentence or will be placed on probation or have other charges withdrawn.

The abuses which are said to be inherent in this practice are that

- (a) a false impression is created in the mind of the accused as to the extent of the influence of the prosecutor in securing a specific sentence;<sup>90</sup>
- (b) there is a tendency towards the habitual laying of charges in a manner intentionally designed to put the prosecutor in the position to offer an apparent concession in the reduction of either the number or seriousness of charges. Overcharging, charging a more serious offence than would appear justified on the facts, and charging offences with a fixed minimum penalty, all fall into this category; and
- (c) the existence of the practice leads to an expectation on the part of the accused that a "deal" will be offered and he may use delaying tactics (such as dismissing his counsel on the eve of trial or electing trial in another court when he intends to plead guilty eventually), simply for the purpose of exerting pressure on the prosecutor to offer a concession.

Much has been said and written about this subject, but in our view the principles are clear.<sup>91</sup>

In the first place, we consider the matter insofar as plea negotiations may be carried on with the police. In most cases the police officers lay the appropriate charge or charges arising out of the event that has given rise to police action. In many cases several charges may be laid arising out of the same facts, for example, an accused may be charged with breaking and entering a dwelling house with an intent to commit an indictable offence, having in his possession an instrument suitable for house-breaking and theft. All charges arise out of the same event. The breaking and entering

<sup>89</sup>It has been suggested that plea negotiations lend flexibility to the administration of criminal justice by permitting the avoidance of unjustifiably harsh provisions of the substantive law; that they relieve the accused and the prosecution from the inevitable risks and uncertainties of trial; and that they serve law enforcement needs by permitting the exchange of leniency for information and assistance from accused persons.

<sup>90</sup>If the prosecutor is unable or unwilling to secure the court's concurrence in the sentence, the accused has no assurance that he will be permitted to withdraw his plea.

<sup>91</sup>Some examples from this jurisdiction are: Grossman, *The Prosecutor*; 1969 *Law Society Special Lectures* 267, 279; *Proceedings of the Canadian Bar Association*, Aug. 3-4, 1972.



charge carries a penalty up to life imprisonment. The penalty for possession of an instrument suitable for house-breaking may be up to 14 years and theft 10 years. It has been said to us that defence counsel frequently approach the police officer in charge of the case and seek to "make a deal" that a plea of guilty will be entered for the offence carrying the lightest punishment or an included offence; for example, where a charge is one of assault causing actual bodily harm, a proposition will be made by defence counsel that a plea of guilty will be entered for common assault (an included offence), which carries a much lower range for punishment. In return for the offer to plead guilty, the police officer is expected to temper his instructions to the Crown attorney. We are not making any findings as to whether such practices or similar practices exist but if they do exist we have no hesitation in condemning them. Police officers should not be involved in plea discussions either with the accused or defence counsel. The duty of the police officer is to marshal the evidence and report the facts to the Crown attorney and when he has done that his responsibilities cease and then pass to the Crown attorney.

When the Crown attorney has been instructed fully he must determine what charges should be proceeded with on the basis of the known facts. This is his duty as counsel representing Her Majesty, The Queen, in our courts. He must discharge this duty with fairness to the accused and fairness to the public. Bargaining with defence counsel has no place in the discharge of this duty.

As cases develop, however, the evidence obtained or given in the witness box may vary substantially from the statement given to the police or the Crown attorney in the first instance. It may become clear during the progress of the case that it is not likely that the court or a jury will find the accused guilty of the major charge laid in the indictment, or that where several charges have been laid it would be wrong to seek convictions on all charges. In such case the Crown attorney must elect the course he should pursue, having regard to all the circumstances. Defence counsel may offer a plea of guilty to an offence included in the major offence charged or one or more of several offences charged. If this is done, the Crown attorney must decide whether it is fair to the accused or required in the public interest to proceed further if the plea of guilty is entered. Here again, there is no room for bargaining. The Crown attorney exercises a quasi-judicial function attached to his office as Crown counsel for Her Majesty.

Up to the stage where defence counsel states that he will enter a plea of guilty to any charge, there should be no discussion with the trial judge and no promises concerning sentence. When that stage has been reached the provisions of section 534(6) of the *Criminal Code* may be applicable. It reads as follows:

Notwithstanding any other provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, the court may in its discretion with the consent of the prosecutor accept such plea of guilty and, where such plea is accepted, shall find the accused not guilty of the offence charged.



This provision was added as an amendment to the Code following the decision of the Ontario Court of Appeal in *R. v. Dietrich*,<sup>92</sup> in which the court held that a trial judge had no jurisdiction to accept a plea of guilty to non-capital murder on an indictment charging capital murder. The meaning of this section is not clear and particularly it is not clear whether it applies to the trial of cases other than on indictment. It appears in Part XVII of the Code, which is concerned with trials on indictment, but it may be broad enough to apply to all trials. Be this as it may, the principles we are discussing should apply to all trials.

When an application is made to the court to exercise the power conferred on it under section 534(6), it is proper to make representations supporting the acceptance of the plea of guilty. The court has a power but its exercise should be based on proper material. The material on which it is asked to act should be offered in open court. This procedure is an integral part of a criminal trial and no representations (except in very exceptional cases) should be made to the judge that are not made in open court. It is essential to public confidence in the administration of justice that all aspects of a criminal trial be conducted openly.

The power that the court exercises in deciding to accept a plea of guilty to an included or "other offence" and to enter a plea of not guilty to the offence charged is not an unfettered discretion but a judicial power to be exercised on proper material submitted publicly to the court. It is therefore clear that apart from very exceptional circumstances neither counsel for the Crown nor counsel for the accused either alone or together should discuss with the judge matters bearing on the exercise of the judge's power in the judge's chambers or any place other than in open court. If there are very special circumstances that make it necessary to discuss relevant matters with the judge in his chambers, a court reporter always should be present to take down the full discussion and it should form part of the record in the case. In our view, there should be no representations held out directly or indirectly concerning the sentence that may be imposed. The full responsibility for the conduct of the Crown's case lies on the Crown counsel and the responsibility for imposing the sentence lies on the presiding judge. He may listen to representations presented by the defence counsel and the Crown counsel and then, and only then, should there be any indication as to the sentence to be imposed. The fact that the accused has pleaded guilty is only one element to be taken into consideration but it is not an element that can be the subject of a "bargain".

The ultimate responsibility concerning this subject rests with the Attorney General who must determine the philosophy and practice to be applied. In our view legislation is not necessary. We recommend that the following guidelines be laid down for the guidance of prosecutors in respect of plea negotiations:

- (1) Expediency should not be a consideration or a motive. The problems arising out of the burden of heavy caseloads must be solved

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<sup>92</sup>[1968] 2 O.R. 433.





by means other than negotiated pleas of guilty whether related to sentence or otherwise.

- (2) The prosecutor should do nothing to induce or compel a plea of guilty to a reduced number of charges or a lesser or included offence.
- (3) The prosecutor should permit to be maintained only those charges on which he intends to proceed to trial.
- (4) The prosecutor should not agree to the acceptance of a plea of guilty to an offence that the evidence in his possession does not support.
- (5) The prosecutor should not agree to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred by statutory limitation or otherwise.
- (6) In all discussions with defence counsel the prosecutor must maintain his freedom to do his duty as he sees fit. Nothing should be said or done to fetter the freedom of the prosecutor and the defence counsel.
- (7) The prosecutor may state to defence counsel the views he may give, if asked by the presiding judge to comment on the matter of sentence. No undertaking should be given relating to the term of sentence by the prosecutor. He may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to him and what the appropriate form of sentence might be, but it should be made clear that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General in the exercise of his discretion whether to appeal against the sentence or not.
- (8) There should be no attempt to reduce the gravity of the evidence to suit the reduced charge.
- (9) The prosecutor should always consider himself as agent of the Attorney General. The ultimate responsibility for disposition of the case must always rest with the court except in those cases where the Attorney General wishes to withdraw the charge.
- (10) Apart from very exceptional circumstances neither counsel for the Crown nor counsel for the accused, either alone or together, should discuss a proposed plea of guilty with the judge in his chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by very exceptional circumstances, a court reporter always should be present to take down the full discussion which should form part of the record of the case.

Together with guidelines to the Crown attorneys, instructions should be issued by the proper authorities to police officers. It should be made a matter of misconduct, for which a police officer may be disciplined, to discuss with an accused person or his counsel any arrangement to plead guilty to any offence on any understanding or undertaking with respect to sen-



tence or what charges will be prosecuted and what charges will not be prosecuted. The police officer should be required to make a full and fair disclosure to the Crown attorney of all relevant evidence and all relevant discussions that have taken place concerning the case. This disclosure should be facilitated if our recommendations concerning instructing Crown attorneys are adopted.

It is fair to assume that the Law Society of Upper Canada will co-operate in enforcing standards of professional ethics for defence counsel relative to the maintenance of the guidelines set for Crown attorneys and police officers.

In expressing our views as to the course of action that should be taken with respect to Crown attorneys we do not wish it to be implied that we are in any way criticizing them regarding their conduct in the matters considered. We have had close cooperation from the representatives of the Crown Attorneys' Association in formulating the guidelines that we are recommending, and we may say that the submissions of the Crown Attorneys' Association on this matter substantially conform to the guidelines we have developed.

Earlier we said that the matter of expediency ought not to be a consideration in carrying out the procedure laid down by the *Criminal Code*. There is no doubt that heavy caseloads may be more easily liquidated by negotiating pleas of guilty. To accede to the negotiation of pleas of guilty as a method of economizing on means to provide for the proper disposition of caseloads in the criminal courts is to resort to procedures that will corrupt the administration of justice and destroy it as an effective power in the regulation of society. It will destroy public confidence in the courts and create distrust and suspicion of favours. The real ligaments that hold society together are to be found in the fair, just and open procedures of the courts.

The conclusions we have arrived at are substantially the same as those arrived at by the National Advisory Commission for Criminal Justice Standards and Goals in the United States where the subject of plea bargaining has reached acute proportions. We may say our conclusions were arrived at and recorded before the publication of the National Advisory Commission's standard. The Commission proceeded on the principles that the conviction of an accused person should depend not on negotiation but on the evidence available to convict him and the sentence imposed should depend on the action which best serves rehabilitative and deterrent needs. The following are excerpts from the standard and commentary:

As soon as possible, but in no event later than 1978, negotiations between defendants and their attorneys and prosecutors concerning concessions to be made in return for guilty pleas should be abolished. In the event that the prosecution makes a recommendation as to sentence, it should not be affected by the willingness of the defendant to plead guilty to some or all of the offences with which he is charged. A plea of guilty should not be considered by the court in determining the sentence to be imposed.



The Commission . . . totally condemns plea bargaining as an institution and recommends that within five years no such bargaining take place. (See generally the opinion of Judge Charles L. Levin, concurring with the result in *People v. Byrd*, 12 Mich. App. 186, 162 N.W. 2d 777 (1968).) Basic to the Commission's position on plea negotiations is its conclusion that lack of resources should not affect the outcome of the processing of a criminal defendant and that it is not unrealistic to expect that the criminal justice system can and will be provided with adequate resources. Thus the Commission rejects the notion that plea negotiations should or must be retained in whole or in part as an accommodation to reality.<sup>93</sup>

We agree that the very fibre of the system of criminal justice is jeopardized if reliance is placed on a concept of plea bargaining as a means of dispatching the disposition of criminal cases.

#### H. SUMMARY OF RECOMMENDATIONS

##### *Functions and Duties*

1. Provincial judges, not Crown attorneys, should be charged with the responsibility to advise justices of the peace with respect to the performance of their judicial duties.
2. Crown attorneys should continue to be appointed for each county or district.
3. The office of clerk of the peace should be abolished and most of the duties required to be performed by the holders of the office should be imposed on the clerk of the County Court. Under particular statutes where the nature of the subject matter makes it appropriate for the clerk or registrar of another court to perform certain duties, the duties should be specifically imposed on such other officer. Crown attorneys should cease to be *ex officio* clerks of the peace.
4. Other duties of Crown attorneys which are of an essentially administrative or clerical nature might be transferred to other officials. Examples are the employment of interpreters under *The Administration of Justice Act* and the authorization for the payment of additional witness fees under *The Crown Witnesses Act*.
5. Crown attorneys should not be required by statute to act as *pro tempore* local registrar, county court clerk, surrogate registrar or sheriff when those offices become vacant.

##### *Status*

6. The provisions of *The Public Officers' Fees Act* and *The Crown Attorneys Act* as they relate to the appointment of Crown attorneys on a fee basis should be repealed.

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<sup>93</sup>Quoted in 4 C.J.N. 12-13.





7. *The Crown Attorneys Act* should be amended to provide for appropriate specifications for the appointment and advancement of Crown attorneys in the public service.
8. All the provisions of *The Public Service Act* should be reviewed and only those which are appropriate to govern the conditions of employment of Crown attorneys should be retained to supplement *The Crown Attorneys Act*.

#### *Assignment of Personnel*

9. There should be continuing flexibility in setting the complement of Crown attorneys. Guidelines for staff requirements are useful but should not be regarded as rigid rules excluding the consideration of individual differences.
10. A new approach should be taken to the use of part-time assistant Crown attorneys. Permanent assistant Crown attorneys should be appointed without delay to those counties and districts where the workload, both in and out of court, so warrants.
11. Part-time appointments should be kept to a minimum and the appointees called on to act only in unusual circumstances. It should be made clear that it is improper for a part-time appointee when acting in that capacity to engage in the defence of criminal cases and to act at any time directly or indirectly in a civil case arising out of the same incident as any criminal case in which he acted or gave advice in his capacity as part-time assistant Crown attorney.
12. Police officers should be relieved of prosecutorial duties in the courts.
13. They should be replaced by law clerks, retired police officers or students-at-law all under the supervision and direction of the Crown attorney.

#### *Instruction Briefs and Disclosure*

14. The Provincial Director of Court Administration should take immediate steps to develop systems for ensuring that Crown attorneys receive from the police adequate information well in advance to permit preparation for trial.
15. An instructing Crown attorney should be appointed to be located at "Old City Hall", Toronto, to be responsible for the establishment and maintenance of the information flow between police and Crown attorneys with respect to cases in this court, and under the direction of the Crown Attorney and Deputy Crown Attorney for the assignment of assistant Crown attorneys to the courts.
16. The instructing Crown attorney should have adequate secretarial and clerical staff and should have at least three other assistant Crown attorneys assigned to assist him.





17. The Crown attorney for each county and district, and the instructing Crown attorney at "Old City Hall" in Toronto under the supervision and direction of the Crown Attorney for the Judicial District of York, should develop and supervise systems of disclosure to defence counsel.
18. We recommend for consideration the adoption of the trial coordinator system for the County Court Judges' Criminal Courts and General Sessions of the Peace in large urban centres outside the Judicial District of York.

#### *Education and Training of Crown Attorneys*

19. The facilities of the Crown Attorneys' School should be extended to afford expanded courses of longer duration. It should receive the financial support necessary to encourage extensive study and research.

#### *Plea Negotiation*

20. The following guidelines should be laid down for prosecutors in plea negotiations:
  - (a) Expediency should not be a consideration or a motive. The problems arising out of the burden of heavy caseloads must be solved by means other than negotiated pleas of guilty whether related to sentence or otherwise.
  - (b) The prosecutor should do nothing to induce or compel a plea of guilty to a reduced number of charges or a lesser or included offence.
  - (c) The prosecutor should permit to be maintained only those charges on which he intends to proceed to trial.
  - (d) The prosecutor should not agree to the acceptance of a plea of guilty to an offence that the evidence in his possession does not support.
  - (e) The prosecutor should not agree to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred by statutory limitation or otherwise.
  - (f) In all discussions with defence counsel the prosecutor must maintain his freedom to do his duty as he sees fit. Nothing should be said or done to fetter the freedom of the prosecutor and the defence counsel.
  - (g) The prosecutor may state to defence counsel the views he may give, if asked by the presiding judge to comment on the matter of sentence. No undertaking should be given relating to the term of sentence by the prosecutor. He may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to him and what the appropriate form of sentence might be, but it should be made clear that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney General in the exercise of his discretion whether to appeal against the sentence or not.



- (h) There should be no attempt to reduce the gravity of the evidence to suit the reduced charge.
  - (i) The prosecutor should always consider himself as agent of the Attorney General. The ultimate responsibility for disposition of the case must always rest with the court except in those cases where the Attorney General wishes to withdraw the charge.
  - (j) Apart from very exceptional circumstances neither counsel for the Crown nor counsel for the accused, either alone or together, should discuss a proposed plea of guilty with the judge in his chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by the circumstances, a court reporter always should be present to take down the full discussion which should form part of the record of the case.
21. Together with guidelines to the Crown attorneys, instructions should be issued by the proper authorities to police officers to make it a matter of misconduct for which a police officer may be disciplined, to discuss with an accused person or his counsel any arrangements to plead guilty to any offence, on any understanding or undertaking with respect to sentence or what charges will be prosecuted or what charges will not be prosecuted.



ONTARIO CROWN ATTORNEYS CONTINUING EDUCATION

COURSE #1

AUGUST 14TH - 18TH, 1972

MASSEY COLLEGE, UNIVERSITY OF TORONTO

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"THE ROLE OF THE CROWN ATTORNEY  
IN THE  
ADMINISTRATION OF JUSTICE"

F. W. CALLAGHAN, Q.C.,  
DEPUTY ATTORNEY GENERAL.



INTRODUCTION

I HAVE BEEN ASKED TO SPEAK TO YOU TODAY ON THE ROLE OF THE CROWN ATTORNEY IN THE ADMINISTRATION OF JUSTICE. THE BREADTH OF THE TOPIC IS SUCH THAT MY REMARKS OF NECESSITY WILL BE GENERAL. FURTHERMORE, AS BOTH YOU AND I ARE RELATIVELY NEW TO OUR RESPECTIVE RESPONSIBILITIES, EXPERIENCE AND TIME MIGHT WELL TEMPER OUR APPROACH TO THE PARTICULAR MATTERS THAT I AM ABOUT TO DISCUSS WITH YOU. IT IS FAIR TO SAY, HOWEVER, THAT THE VIEWS I AM ABOUT TO GIVE YOU TODAY I HAVE HELD FOR SOME TIME BOTH AS A MEMBER OF THE DEFENCE BAR AND THE STAFF OF THE ATTORNEY GENERAL OF THIS PROVINCE.

WHENEVER I AM ASKED JUST WHAT THE ROLE OF THE CROWN ATTORNEY IS, I INVARIABLY REFER THE QUESTIONER TO THAT STATEMENT OF MR. JUSTICE RAND IN THE CASE OF BOUCHER VS. THE QUEEN, WHERE HE SAID;

" IT CANNOT BE OVEREMPHASIZED THAT THE PURPOSE OF A CRIMINAL PROSECUTION IS NOT TO OBTAIN A CONVICTION; IT IS TO LAY BEFORE A JURY WHAT THE CROWN CONSIDERS TO BE CREDIBLE EVIDENCE RELEVANT TO WHAT IS ALLEGED TO BE A CRIME. COUNSEL HAVE A DUTY TO SEE THAT ALL AVAILABLE LEGAL PROOF OF THE FACTS IS PRESENTED; IT SHOULD BE DONE FIRMLY AND PRESSED TO ITS LEGITIMATE LENGTH, BUT IT ALSO MUST BE DONE FAIRLY. THE ROLE OF THE PROSECUTOR EXCLUDES





ANY NOTION OF WINNING OR LOSING; HIS FUNCTION IS A MATTER OF PUBLIC DUTY THAT IN WHICH IN CIVIL LIFE THERE CAN BE NONE CHARGED WITH A GREATER PERSONAL RESPONSIBILITY. IT IS TO BE EFFICIENTLY PERFORMED WITH AN INGRAINED SENSE OF THE DIGNITY, THE SERIOUSNESS AND THE JUSTNESS OF JUDICIAL PROCEEDINGS."

THAT STATEMENT NOT ONLY DELINEATES THE ROLE OF THE CROWN ATTORNEY, BUT IT PROVIDES A CLEAR GUIDELINE AS TO THE MANNER IN WHICH HIS RESPONSIBILITIES MUST BE DISCHARGED IN OUR ADMINISTRATION OF JUSTICE. I CAN THINK OF NO BETTER STARTING POINT FOR ANY PERSON ENTERING A CAREER AS CROWN ATTORNEY THAN A THOROUGH AND COMPLETE READING OF THE CASE OF BOUCHER VS. THE QUEEN. (1955 S.C.R. 16)

IT IS TRITE LAW, OF WHICH YOU ARE ALL AWARE, THAT UNDER THE BRITISH NORTH AMERICA ACT THE ATTORNEY GENERAL OF THE PROVINCE IS RESPONSIBLE FOR THE ADMINISTRATION OF CRIMINAL JUSTICE. THE CROWN ATTORNEY, OF COURSE, IS HIS DIRECT REPRESENTATIVE IN EACH LOCALITY OF THE PROVINCE. I AM SURE YOU ARE ALL AWARE THAT THE FUNDAMENTAL RESPONSIBILITIES OF THE CROWN ATTORNEY DO NOT DIFFER FROM THOSE WHICH HAVE LONG BEEN RECOGNIZED AS THE RESPONSIBILITIES OF A CROWN COUNSEL IN ENGLAND. I AM NOT REFERRING TO THOSE DUTIES FOUND IN THE CROWN ATTORNEYS ACT, WHICH I ASSUME YOU ARE FAMILIAR WITH, BUT RATHER TO THOSE VERY BASIC RESPONSIBILITIES WHICH HAVE DEVELOPED IN THE TRADITIONS OF YOUR OFFICE. GUIDANCE IS TO BE FOUND FOR THE DISCHARGE OF THESE RESPONSIBILITIES AND ANALOGIES ARE TO BE DRAWN WITH THE MANNER IN WHICH THOSE RESPONSIBILITIES ARE DISCHARGED IN ENGLAND AND NOT WITH THE MANNER IN WHICH THEY ARE DISCHARGED IN THE UNITED STATES. UNLIKE THE DISTRICT ATTORNEY, YOU DO



NOT INVADE THE REALM OF THE INVESTIGATING POLICE OFFICER IN OUR SYSTEM OF JUSTICE. THE NATURE OF YOUR OFFICE OF CROWN ATTORNEY IS ENTIRELY DIFFERENT.

#### NATURE OF THE OFFICE OF CROWN ATTORNEY

THE NATURE OF YOUR OFFICE, OF COURSE, IS DICTATED TO A LARGE EXTENT BY THE CHARACTER OF A CRIMINAL PROSECUTION. THIS IS NOT A CONTEST BETWEEN INDIVIDUALS, NOR IS IT A CONTEST BETWEEN THE CROWN ENDEAVORING TO OBTAIN A CONVICTION AND AN ACCUSED PERSON SEEKING AN ACQUITTAL. AS RAND J. SAID YOUR ROLE EXCLUDES ANY NOTION OF WINNING OR LOSING, YOUR FUNCTION IS A PUBLIC DUTY, PROFESSIONAL RIVALRY DOES NOT ENTER THE DISCHARGE OF YOUR RESPONSIBILITIES. THE WIDE DISCRETIONS GIVEN YOU, WHICH I WILL DEAL WITH LATER, ARE EXERCISED IN THE INTEREST OF JUSTICE. YOU ARE NOT THE SERVANT OF THE CROWN, THE SERVANT OF ANY POLITICAL PARTY, THE SERVANT OF THE GOVERNMENT, THE SERVANT OF AN OBSOLESCENT OR RIGOROUS POSITIVE LAW. RATHER, IN FACT, YOU ARE A SERVANT OF JUSTICE. IT HAS BEEN SAID THAT THE OFFICE OF ATTORNEY GENERAL MUST STAND ABOVE AND APART FROM THE CLAMOR OF THE CROWD. THIS ALSO APPLIES TO HIS REPRESENTATIVES. YOU MUST NOT ALIGN WITH ANY PERSONS OR GROUP OF PERSONS IN THE EXERCISE AND DISCHARGE OF YOUR RESPONSIBILITIES, PARTICULARLY IN THE EXERCISE OF YOUR DISCRETION IN DETERMINING WHETHER TO



PROSECUTE OR NOT TO PROSECUTE, ONLY THE PUBLIC INTEREST SHOULD DICTATE THE PATH YOU WILL FOLLOW. I KNOW THESE ARE BROAD GENERALITIES AND I KNOW YOU HAVE HEARD THEM BEFORE, BUT THEY ARE SO IMPORTANT TO YOUR ROLE IN THE ADMINISTRATION OF JUSTICE THAT I HAVE NO HESITATION IN REPEATING THEM TO YOU. YOU ARE ONE OF A GROUP OF INDIVIDUALS IN CIVILIAN LIFE OF THIS SOCIETY WHO ARE CHARGED WITH A GREAT PERSONAL RESPONSIBILITY. YOUR SOLE CONCERN IS JUSTICE WHICH IS SOMETHING THAT IS SO CLOSE TO THE HEARTS OF MEN THAT THOSE CHARGED WITH ITS ADMINISTRATION MUST BE BEYOND THE APPEARANCE OF INFLUENCE BY ALL PERSONS, GROUPS OR PARTIES, POLITICAL AND OTHERWISE.

THIS IS ONE OF THE BASIC REASONS WHY YOUR ROLE IN OUR ADMINISTRATION OF JUSTICE DIFFERS FROM THAT OF THE DISTRICT ATTORNEY IN THE UNITED STATES. YOU CANNOT TAKE AN ACTIVE PART IN THE POLICE INVESTIGATION OF A CRIME IN ITS PRELIMINARY STAGES. TO DO SO, WOULD PLACE YOU IN A POSITION SIMILAR TO THAT OF A POLICEMAN OR A DETECTIVE AND YOU THEREBY BECOME AN ACCUSER, RATHER THAN ONE CONCERNED WITH AND SEEKING JUSTICE. IF THERE IS ANY POLITICAL INVOLVEMENT IN YOUR CONDUCT, THEN THE OPPORTUNITY TO ACT IN AN IMPARTIAL AND QUASI-JUDICIAL ROLE IS SERIOUSLY IMPAIRED, IF NOT WHOLLY ELIMINATED. YOU SHOULD, OF COURSE, BE AWARE OF THE PROHIBITION ON POLITICAL ACTIVITY FOUND IN THE PUBLIC SERVICE ACT OF ONTARIO. THE POLICE ARE ENTITLED TO SEEK YOUR ADVICE ON MATTERS LEGAL AND FACTUAL IN RELATION TO THE PROOF OF A



PARTICULAR OFFENCE, BUT BECAUSE OF THE NATURE OF YOUR OFFICE, YOU MUST NOT PARTICIPATE IN THE INVESTIGATION OR ATTEMPT TO DISCHARGE THE RESPONSIBILITIES OF AN INVESTIGATOR. AS YOU ARE NO DOUBT AWARE, THE GOVERNMENT OF THIS PROVINCE HAS RECENTLY RE-ORGANIZED THE JUSTICE POLICY FIELD. IT HAS SEVERED FROM THE DIRECTION OF THE ATTORNEY GENERAL THE LAW ENFORCEMENT AGENCIES. IT HAS CREATED A SEPARATE MINISTRY IN THE GOVERNMENT FOR A SOLICITOR GENERAL WHO IS RESPONSIBLE FOR THE ADMINISTRATION OF POLICE FORCES IN THIS PROVINCE. FROM YOUR POINT OF VIEW AS A CROWN ATTORNEY THIS SHOULD GIVE YOU THE MAXIMUM FREEDOM IN DEALING WITH POLICE FORCES. YOU DEAL WITH THEM, NOT AS THE LEGAL EXTENSION OF THE POLICE ARM, BUT RATHER AS AN EXTENSION OF THE COURT SYSTEM WHICH IS ATTEMPTING TO ENSURE THAT ALL INDIVIDUALS WHO ARE BROUGHT BEFORE THE BAR OF JUSTICE ARE TREATED FAIRLY AND EQUITABLY IN ACCORDANCE WITH OUR LAWS. YOU ARE AN OFFICER OF THE COURT BUT AS A PRACTICAL MATTER, YOU WILL HAVE TO WORK CLOSELY WITH POLICE AGENCIES. THIS DOES NOT NECESSITATE THE ESTABLISHMENT OF CLOSE SOCIAL AND PERSONAL RELATIONSHIPS WITH SOME OF THEIR MEMBERS. SUCH RELATIONSHIPS MAY WELL IMPAIR OR MAKE IT VERY DIFFICULT FOR YOU TO DISCHARGE YOUR RESPONSIBILITIES AS AN IMPARTIAL SEEKER OF JUSTICE IN YOUR LOCALITY IF YOU ARE TOO CLOSELY ALIGNED WITH THEM. THE RELATIONSHIP SHOULD BE A PROFESSIONAL SOLICITOR-CLIENT RELATIONSHIP. YOUR SUCCESS AS A CROWN ATTORNEY WILL DEPEND LARGELY ON YOUR ABILITY TO GET ALONG WITH AND HAVE THE RESPECT OF THE POLICE FORCES IN YOUR COMMUNITY, BUT YOUR PRIME RESPONSIBILITY IS TO THE ADMINISTRATION OF JUSTICE TO SEE THAT THE RULE OF LAW PREVAILS





AND THOSE ACCUSED OF CRIME ARE TREATED FAIRLY IN ACCORDANCE WITH THOSE RULES. THIS, OF COURSE, DOES NOT MEAN THAT YOU DO NOT PRESS FIRMLY AND TO ITS LEGITIMATE END A PROSECUTION, BUT IT DOES MEAN THAT YOUR ASSESSMENT OF ALL THE INCIDENTS OF THAT PROSECUTION MUST BE OBJECTIVE AND IMPARTIAL AND YOUR ACTIONS DICTATED BY THE ENDS OF JUSTICE.

### THE INSTITUTION OF THE PROSECUTION

MANY FACTORS, OF COURSE, BLEND TOGETHER TO DICTATE YOUR ROLE IN THE ADMINISTRATION OF JUSTICE. THE INSTITUTION OF THE PROSECUTION ITSELF AND THE DISCRETION GIVEN TO YOU IN RELATION THERETO IS ONE OF THE MAJOR FACTORS. IT IS COMPLETELY WRONG IN MY VIEW TO HOLD THAT BECAUSE THE LAW ENFORCEMENT AGENCIES HAVE LAID A CHARGE, THE CROWN ATTORNEY MUST AUTOMATICALLY AND MECHANICALLY PROCESS THE MATTER THROUGH THE COURTS. THE ATTORNEY GENERAL, AND YOU AS HIS AGENT, ARE GIVEN A DISCRETION WHICH MUST BE EXERCISED IN A QUASI-JUDICIAL MANNER TO DETERMINE WHETHER OR NOT STEPS WILL BE TAKEN TO ENFORCE THE CRIMINAL LAW IN ANY PARTICULAR SITUATION. IT HAS NEVER BEEN THE RULE IN THIS PROVINCE, AND I HOPE IT NEVER WILL BE, THAT SUSPECTED CRIMINAL OFFENCES MUST AUTOMATICALLY BE THE SUBJECT OF PROSECUTION. THE PUBLIC INTEREST IS THE DOMINANT CONSIDERATION OF ANY GIVEN CASE. BEFORE PROCEEDING, YOU MUST GIVE A CONSCIENTIOUS APPRAISAL TO WHETHER OR NOT THERE IS SUFFICIENT EVIDENCE TO WARRANT A PROSECUTION. YOU COMMENCE NO PROSECUTION UNLESS THERE IS A PRIMA FACIE CASE. YOU MUST CONSIDER WHETHER THE PROSECUTION IS LIKELY TO SUCCEED, BECAUSE IT IS BAD FOR THE ADMINISTRATION OF



OF JUSTICE IF MANY PROSECUTIONS ARE UNDERTAKEN WHEN THERE IS NO REASONABLE HOPE OF OBTAINING A CONVICTION. SOMETIMES, HOWEVER, YOU MAY HAVE SPECIAL REASONS FOR LAUNCHING WHAT IS LEGALLY A WEAK CASE, FOR EXAMPLE WHERE THE ACCUSED IS MORALLY GUILTY AND THE LEGAL POINT IS ARGUABLE AND IMPORTANT. IT MAY WELL BE IN THE PUBLIC INTEREST TO LAUNCH SUCH A PROSECUTION, BUT BEFORE DOING SO, YOU MUST HAVE DIRECTED YOUR MIND TO THE PUBLIC INTEREST IN THE MATTER - AND AGAIN YOU MUST HAVE A PRIMA FACIE CASE -

I HAVE ALREADY MADE THE POINT THAT BY YOUR CONDUCT AND ASSOCIATIONS YOU MUST BE BEYOND AND APPEAR TO BE BEYOND THE INFLUENCE OF ANY INDIVIDUALS OR GROUPS. THIS APPLIES EQUALLY TO THE DECISION TO PROSECUTE OR NOT TO PROSECUTE. THE LAW CAN BE NO RESPECTOR OF PERSONS OR OF BODIES OF PERSONS AND ACCORDINGLY, IT IS NO ARGUMENT AGAINST A PROSECUTION OF SAY, A BANKER, TO SUGGEST THAT THE RESULT OF THE PROSECUTION WOULD SHAKE PUBLIC CONFIDENCE IN THE BANKING SYSTEM OR THE BANKING ESTABLISHMENT. THAT IS NOT THE PUBLIC INTEREST THAT YOU CONSIDER. THERE ARE, HOWEVER, PROPER CONSIDERATIONS SUCH AS THE EFFECT OF THE PROSECUTION UPON THE PUBLIC MORALE AND PUBLIC ORDER. YOU MAY DECLINE TO PROSECUTE BECAUSE IN CERTAIN CIRCUMSTANCES, THE DEFENDANT MAY BE ABLE TO POSE AS A MARTYR THEREAFTER. IF YOU RECALL IN ENGLAND IN 1951, THE



STONE OF SCONE WAS STOLEN. THOSE RESPONSIBLE FOR THE THEFT WERE WELL KNOWN, BUT THE ATTORNEY GENERAL OF THE TIME DECLINED TO PROSECUTE FOR THAT VERY REASON. CONSIDERATIONS OF JUSTICE AND MERCY, OF COURSE, ARE IN THE PUBLIC INTEREST BECAUSE THEY REFLECT DIRECTLY ON OUR TOTAL ADMINISTRATION OF JUSTICE. THERE WILL BE SITUATIONS WHERE YOU MAY CONCLUDE THAT THE WRONG-DOER HAS ALREADY SUFFERED ENOUGH OR PERHAPS HE IS TOO ILL TO STAND TRIAL WITHOUT GREAT RISK TO HIS HEALTH. THESE ARE ALL MATTERS WHICH A CROWN ATTORNEY CAN APPROPRIATELY CONSIDER IN DECIDING WHETHER TO PROSECUTE OR NOT.

YOU SHOULD ALSO CONSIDER WHETHER OR NOT THE PARTICULAR CIRCUMSTANCES COME WITHIN THE REAL VICE AT WHICH THE SECTION OF THE CRIMINAL CODE OR THE ACT OF THE LEGISLATURE IS DIRECTED. TO USE THE CRIMINAL PROCESS IN CASES WHICH WERE NOT INTENDED TO BE COVERED BY IT, BRINGS THE ADMINISTRATION OF JUSTICE INTO CONTEMPT. AN EXAMPLE FREQUENTLY GIVEN RELATES THE OFFENCE OF CARNAL KNOWLEDGE WITH A GIRL BETWEEN THE AGES OF 14 AND 16. THIS SECTION IS INTENDED TO PROTECT INNOCENT GIRLS FROM CORRUPTION BY VICIOUS MEN. IT IS NOT INTENDED TO MAKE CRIMINALS OUT OF RESPECTABLE YOUNG COUPLES WHO ARE COURTING, OFTEN WITH THE APPROVAL OF THEIR PARENTS, AND FALL VICTIM TO ONE OF THE STRONGEST AND MOST NATURAL TEMPTATIONS OF MANKIND. IN ABORTION, ALTHOUGH ITS SIGNIFICANCE IS WANING



TODAY, THE CODE WAS NOT INTENDED TO BE USED TO PROSECUTE THE MOTHER, WHO CONSENTED TO THE ABORTION, BUT RATHER IT IS DIRECTED TO ELIMINATE THE PROFESSIONAL NON-MEDICAL ABORTIONISTS PREYING ON SOCIETY. AGAIN, THE CHARGE OF ABDUCTION WAS NOT DESIGNED TO BE USED AS A TOOL TO RESOLVE CUSTODY DISPUTES BETWEEN THE NATURAL PARENTS OF CHILDREN. AT PRESENT THERE IS SOME CONFUSION ON THIS PARTICULAR POINT, BUT IT IS MY VIEW THAT THE CRIMINAL LAW PROCESS SHOULD NOT BE INVOKED IN THESE CIRCUMSTANCES TO RESOLVE BASICALLY WHAT IS A CIVIL MATTER. IN ANY EVENT, IN EXERCISING YOUR DISCRETION, YOU WILL, OF COURSE, CONSIDER THE PARTICULAR EVIL TO WHICH THE SECTION OF THE CRIMINAL CODE OR THE ACT OF THE LEGISLATURE IS DIRECTED. YOU WILL NOT PERMIT A STATUTE TO BE USED FOR ANY OTHER PURPOSE. I REALIZE THAT IN MANY CASES YOU WILL NOT HAVE AN OPPORTUNITY TO CONSIDER ALL THESE FACTORS, BUT WITH EXPERIENCE I WOULD HOPE YOU WILL BE ABLE TO SPOT QUICKLY THOSE CASES WHERE SERIOUS CONSIDERATION SHOULD BE GIVEN BY YOU AS CROWN ATTORNEY TO REQUIRE THAT THE CHARGE BE WITHDRAWN. THE PRESSURE OF YOUR DAY TO DAY BUSINESS MAY MAKE THIS SOUND VERY THEORETICAL, BUT IF YOU ARE, IN FACT, GOING TO DISCHARGE YOUR RESPONSIBILITIES TO THE ADMINISTRATION OF JUSTICE, THEN YOU WILL HAVE TO CONTINUALLY DIRECT YOUR MIND TO THIS QUESTION. THE DECISION OF WHETHER OR NOT TO PROSECUTE WILL IN MANY CASES BE THE MOST DIFFICULT DECISION THAT YOU EVER MAKE AS A CROWN ATTORNEY.





## RELATIONS WITH DEFENCE BAR

ANOTHER FACTOR WHICH IS PART OF THE MOSAIC OF YOUR ROLE IN THE ADMINISTRATION OF JUSTICE IS THE MANNER AND ATTITUDE WITH WHICH YOU CONDUCT A PROSECUTION ONCE THE DECISION TO PROSECUTE HAS BEEN MADE. IT MUST NOT BE OVERLOOKED AND I CAN ASSURE YOU THAT THE DEFENCE BAR WILL NEVER OVERLOOK THE POWERS AVAILABLE TO THE CROWN ATTORNEY IN THE DISCHARGE OF HIS RESPONSIBILITIES. BECAUSE THESE WIDE POWERS HAVE BEEN GIVEN TO YOU, YOU HAVE A COMMENSURATE RESPONSIBILITY TO SEE THAT THEY ARE EXERCISED FAIRLY. GENERALLY SPEAKING, YOU HAVE UNLIMITED FUNDS WITH WHICH TO FINANCE YOUR PROSECUTION. YOU HAVE A POLICE FORCE AT YOUR COMMAND TO DIG UP WHATEVER EVIDENCE YOU CONSIDER NECESSARY. INDEED, YOU CAN NO DOUBT INVOKE THROUGH THAT POLICE FORCE THE PUBLIC MEDIA TO MAKE AN APPEAL FOR INFORMATION. YOU ALSO HAVE AVAILABLE THE PROVINCIAL CENTRE FOR FORENSIC SCIENCES TO PROVIDE YOU WITH THAT TECHNICAL EVIDENCE SO NECESSARY IN MEETING THE BURDEN OF PROOF. ALL THESE FACILITIES ARE AT YOUR COMMAND. CONTRAST YOUR POSITION WITH THAT OF THE DEFENCE COUNSEL WHO HAS A LEGAL AID CERTIFICATE AND AN INARTICULATE CLIENT. I RECOGNIZE THAT BECAUSE OF THE PRESSURE OF CASE LOADS ON YOU THAT ALL THESE POWERS AND FACILITIES ARE NOT USED TO THEIR FULL BY YOU IN EACH INSTANCE. BUT IN ANY GIVEN CASE, WHERE IN THE EXERCISE OF YOUR DISCRETION YOU FEEL IT IS APPROPRIATE, THEN YOU HAVE RESOURCES WHICH ARE COMPLETE AND TOTAL WITH WHICH TO MEET THE SITUATION.



NOW IN THE USE OF THESE RESOURCES, AND THE CONDUCT OF A PROSECUTION, YOU MUST CONSIDER THEIR IMPACT ON THE VERY JUSTICE OF THE CASE WHICH YOU ARE PUTTING BEFORE THE COURT. WILL JUSTICE BE SERVED IF YOU HARBOUR ALL THESE RESOURCES FOR THE PROSECUTION AND DENY THEM WHERE NECESSARY TO THE DEFENCE... ... IN MY VIEW I THINK NOT.

A NUMBER OF YEARS AGO MY PREDECESSOR, WHO WAS DEPUTY ATTORNEY GENERAL OF THIS PROVINCE, MR. W.B. COMMON, Q.C., SAID TO THE JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT AND CORPORAL PUNISHMENT; (CONVENED DURING THE 22ND PARLIAMENT);

"IN ALL OF THE CASES, NOT ONLY IN CAPITAL CASES, BUT USUALLY IN ALL CRIMINAL CASES, THERE IS COMPLETE DISCLOSURE BY THE PROSECUTION OF ITS CASE TO THE DEFENCE. TO USE A COLLOQUIALISM, THERE ARE NO "FAST ONES" PULLED BY THE CROWN. THE DEFENCE DOES NOT HAVE TO DISCLOSE ITS CASE TO THE CROWN. WE DO NOT ASK IT FOR A COMPLETE FULL DISCLOSURE OF THE CASE. IF THERE ARE STATEMENTS BY WITNESSES, STATEMENTS OF ACCUSED, THE ACCUSED IS SUPPLIED WITH COPIES, THEY KNOW EXACTLY WHAT OUR CASE IS, AND THERE IS NOTHING HIDDEN OR KEPT BACK OR SUPPRESSED SO THAT THE ACCUSED PERSON IS TAKEN BY SURPRISE AT TRIAL BY SPRINGING A SURPRISE WITNESS ON HIM. IN OTHER WORDS, I AGAIN EMPHASIZE THE FACT THAT EVERY SAFEGUARD IS PROVIDED BY THE CROWN TO ENSURE THAT AN ACCUSED PERSON, NOT ONLY IN A CAPITAL CASE, BUT IN EVERY CASE, RECEIVES AND IS ASSURED OF A FAIR AND LEGAL TRIAL."

THOSE REMARKS APPLY EQUALLY TODAY. I RECOGNIZE THAT AS A MATTER OF LAW, THERE IS NO MORE OBLIGATION ON THE CROWN TO DISCLOSE ITS CASE TO THE DEFENCE THAN THERE IS FOR THE DEFENCE TO DISCLOSE ITS CASE TO THE CROWN. THE FACT REMAINS, HOWEVER, THAT TO ENSURE A FAIR TRIAL THE CROWN MUST



NOT HOLD BACK ANYTHING WHEN TO DO SO WOULD PREJUDICE THE COURT IN ARRIVING AT A JUST CONCLUSION. NOT ONLY MUST NOTHING BE SUPPRESSED SO AS TO TAKE THE DEFENCE BY SUPRISE, BUT IN MY VIEW THE CROWN ATTORNEY MUST MAKE AVAILABLE TO THE DEFENCE, IN THE APPROPRIATE CIRCUMSTANCES, THOSE WIDE POWERS WHICH I HAVE ABOVE MENTIONED. THE DEFENCE IS ENTITLED TO CALL UPON YOU TO ASSIST THEM TO FIND WITNESSES AND TO BRING THEM TO COURT OR EVEN TO MAKE WIDE ENQUIRIES FOR CERTAIN EVIDENCE BELIEVED TO EXIST AND TO THAT END TO SPEND PUBLIC MONEY IN THE COURSE OF THAT ENQUIRY. I BELIEVE IT IS YOUR DUTY WITHIN REASONABLE LIMITS, TO OFFER THAT AID AND THE REASON FOR MY BELIEF IS SIMPLY THIS...WHEN YOU ANALYZE THE NATURE OF YOUR OFFICE AND THE NATURE OF A PROSECUTION IN OUR SYSTEM OF JUSTICE, IT BECOMES CLEAR THAT YOU ARE NOT JUST A PROFESSIONAL COUNSEL RETAINED BY THE ATTORNEY GENERAL, BUT ARE IN FACT HIS LOCAL MINISTER OF JUSTICE IN YOUR PARTICULAR COMMUNITY AND AS SUCH, YOU HAVE A RESPONSIBILITY TO SEE THAT ALL PROSECUTIONS ARE CONDUCTED WITH PERFECT FAIRNESS. YOU WILL NEVER BOAST OF THE PERCENTAGE OF CONVICTIONS THAT YOU ACHIEVE OVER YOUR TENURE OF OFFICE, NOR WILL YOU EVER TAKE PRIDE OR SATISFACTION FROM THE MERE FACT YOU HAVE ACHIEVED A CONVICTION. IT IS NO REBUFF TO YOUR PRESTIGE IF YOU FAIL TO CONVINCE THE COURT OF THE PRISONER'S GUILT. YOUR ATTITUDE MUST BE AS OBJECTIVE AS IS HUMANLY POSSIBLE AND YOUR OBJECT IS TO OBTAIN A JUST RESULT.



IT MAY WELL BE THAT IN THE COURSE OF A PROSECUTION YOU REACH A STAGE OF GENUINE DOUBT IN YOUR OWN MIND AS TO THE GUILT OF THE ACCUSED. IN THESE CIRCUMSTANCES YOU MUST BE VERY CAREFUL TO DISTINGUISH BETWEEN A GENUINE DOUBT AS TO HIS GUILT AND YOUR ABILITY TO PROVE HIS GUILT. IF YOU CONCLUDE, HOWEVER, THAT YOU HAVE A GENUINE DOUBT AS TO HIS GUILT, YOU, AS A MINISTER OF JUSTICE, SHOULD BE PREPARED TO DIS-CONTINUE THE PROSECUTION. I KNOW MANY WILL SAY THAT IN THESE CIRCUMSTANCES YOU WILL BE SUBSTITUTING YOUR VIEW FOR THAT OF THE COURT. THE ANSWER TO THAT SIMPLY IS THAT IF YOU ARE A MINISTER OF JUSTICE IT IS NOT IN ACCORDANCE WITH JUSTICE TO ASK THE COURT TO CONVICT A MAN WHOM YOU BELIEVE TO BE INNOCENT, AND THAT TO MY MIND IS A CONCLUSIVE ANSWER TO ANYONE WHO RAISES THE QUESTION. THAT ANSWER, OF COURSE, ONLY FOLLOWS IF YOU ACCEPT MY VIEW THAT YOU ARE FUNDAMENTALLY A LOCAL MINISTER OF JUSTICE AND NOT AN ADVERSARY IN THE PROCEEDINGS. IN THIS CONTEXT I THINK IT ALSO FOLLOWS THAT I CONSIDER IT THE DUTY OF THE CROWN ATTORNEY TO ASSIST THE DEFENCE IN EVERY REASONABLE WAY. THERE WILL BE EXCEPTIONS TO THIS RULE, OF COURSE, WHICH AGAIN WILL FALL WITHIN YOUR OWN DISCRETION AND WHICH YOU WILL FORMULATE, HAVING REGARD TO LOCAL CONDITIONS AND YOUR OWN EXPERIENCE. BY AND LARGE I WOULD EXPECT THE CROWN ATTORNEY, CERTAINLY IN ANY SERIOUS CASE, TO APPROACH DEFENCE COUNSEL BEFORE TRIAL AND SEE IN WHAT WAY YOU CAN HELP AND IN RETURN FOR SUCH HELP I DO NOT BELIEVE IT IS UNREASONABLE FOR YOU TO ASK WHAT PARTS OF YOUR CASE HE WILL ADMIT, SO AS TO REDUCE THE NECESSITY FOR CALLING EVIDENCE. YOU WILL BE SURPRISED HOW EXPERIENCED DEFENCE COUNSEL





WILL CO-OPERATE WITH YOU IN THIS REGARD.

YOU MAY AT THIS POINT BE WONDERING WHETHER OR NOT I AM SUGGESTING THAT YOU JUST LIE DOWN IN THE COURSE OF ANY PROSECUTION AND LET THE DEFENCE RUN ALL OVER YOU. THAT IS NOT MY INTENTION AT ALL. IT IS YOUR DUTY TO PROSECUTE AND YOU DO NOT HAVE TO APOLOGIZE FOR SO DOING. IT IS YOUR DUTY TO PRESS YOUR CASE WITH VIGOUR AND LET THE DEFENCE LOOK AFTER ITSELF IN THE COURSE OF THE TRIAL. I EXPECT YOU TO HIT HARD, BUT ONLY WITH BLOWS THAT ARE SCRUPULOUSLY FAIR. IF YOU HAVE GIVEN THE DEFENCE THE NAMES AND ADDRESSES OF THE CROWN WITNESSES, THE STATEMENTS OR CONFESSIONS OF AN ACCUSED, THE REPORTS OF MEDICAL OR PSYCHIATRIC EXAMINATIONS, ANY REPORTS ON SCIENTIFIC EXPERIMENTS, BALLISTICS, BLOODS, TEXTILES, ETC. THAT YOU HAVE RECEIVED FROM THE FORENSIC LAB, COPIES OF DOCUMENTS, PLANS AND PHOTOGRAPHS ON WHICH YOU INTEND TO RELY, YOU WILL FIND THAT YOU WILL HAVE LEFT THE DEFENCE VERY LITTLE TO COMPLAIN ABOUT. THE TRIAL WILL BE CONDUCTED IN THE ABSENCE OF ALLEGATIONS THAT YOU HAVE FAILED TO CO-OPERATE, WHICH CAN DISTRACT THE COURT FROM THE REAL ISSUE. YOU, OF COURSE, WILL HAVE MUCH INFORMATION IN YOUR POSSESSION AND IT IS A QUESTION FOR YOU TO DECIDE HOW MUCH OF THAT IS RELEVANT TO THE ISSUE AND HOW MUCH YOU WILL DISCLOSE TO THE DEFENCE. THIS IS INFORMATION THAT HAS COME TO YOU IN THE COURSE OF THE PREPARATION OF THE CASE AS OPPOSED TO EVIDENCE UPON WHICH YOU INTEND TO RELY. GENERALLY SPEAKING, HOWEVER, I WOULD EXPECT THAT ANY INFORMATION WHICH YOU HAVE AND



WHICH YOU DO NOT INTEND TO USE, BUT WHICH MIGHT, IF BELIEVED BY THE COURT, ASSIST THE DEFENCE, SHOULD BE MADE AVAILABLE. THERE ARE MANY PRACTICAL PROBLEMS INVOLVED HEREIN, SUCH AS WHETHER OR NOT YOU SHOULD CALL WITNESSES AND PUT THEM ON THE STAND FOR CROSS-EXAMINATION BY DEFENCE COUNSEL. IN MY VIEW YOU NEED NOT GO THAT FAR, HOWEVER, IT MAY WELL BE THAT IN SOME CIRCUMSTANCES YOU WILL FEEL THAT THE ENDS OF JUSTICE REQUIRE IT. ANOTHER PRACTICAL PROBLEM IS THE QUESTION OF WHETHER OR NOT YOU SHOULD SHOW THE CONFIDENTIAL INSTRUCTIONS YOU RECEIVE FROM THE POLICE TO DEFENCE COUNSEL. IN MY VIEW, DISCLOSURE DOES NOT REQUIRE THE CROWN TO MAKE THOSE INSTRUCTIONS AVAILABLE TO DEFENCE COUNSEL, INDEED, IT IS MY VIEW THAT TO DO SO BREACHES A TRUST WHICH THE POLICE PLACE IN YOU BY GIVING YOU CONFIDENTIAL INFORMATION IN THEIR BRIEF. I BELIEVE THAT THE INSTRUCTING POLICE OFFICER IS ENTITLED TO EXPECT THAT YOU WILL DISTINGUISH BETWEEN THAT WHICH IS RELEVANT TO THE CASE AND HELPFUL BOTH TO THE CROWN AND THE DEFENCE AND THAT WHICH IS MERELY INFORMATION OR COMMENT PASSED ON TO YOU FOR YOUR ASSISTANCE. THIS IS NOT THE EVIDENCE WHICH YOU INTEND TO RELY ON AT TRIAL BUT MERELY COMMENT ON IT AND TO DISCLOSE THAT MAY WELL IMPAIR THE FREE FLOW OF INFORMATION BETWEEN YOURSELF AND THE INSTRUCTING OFFICER WHICH IS SO ESSENTIAL TO YOU FOR THE PERFORMANCE OF YOUR DUTIES. I EXPECT THAT THESE PARTICULAR PROBLEMS WILL BE DISCUSSED WITH YOU BY OTHERS IN THE COURSE OF THESE LECTURES. THE POINT I WISH TO MAKE IS A GENERAL ONE AND THAT IS AS A LOCAL MINISTER OF JUSTICE YOU HAVE A DUTY TO SEE THAT EACH ACCUSED PERSON HAS A FAIR AND LEGAL TRIAL. IN ORDER TO ENSURE THAT END, IT WILL BE NECESSARY FOR YOU FROM TIME TO TIME TO PROVIDE WEAPONS TO THE



DEFENCE SO THAT THEY CAN PLACE BEFORE THE COURT THE TOTAL PICTURE IN RELATION TO THE PROSECUTION AND IT HAS BEEN MY EXPERIENCE THAT WHEN YOU HAVE DONE THIS, YOU WILL FEEL FREE TO PRESS YOUR CAUSE VIGOROUSLY AND TO FIGHT IN COURT WITH A CLEAR CONSCIENCE THE FORENSIC BATTLE OF THE ACCUSED'S GUILT OR INNOCENCE IN ACCORDANCE WITH THE TRADITIONS OF YOUR OFFICE.

IN THE COURSE OF A TRIAL IT IS VERY EASY TO BECOME BLINDED BY THE ANTICS OF SOME DEFENCE COUNSEL AND, NO DOUBT, SOME OF YOU HAVE SUSTAINED EXPERIENCE WHICH LEADS YOU TO QUESTION WHY I SUGGEST THAT YOU ASSIST THE DEFENCE COUNSEL WHERE NECESSARY, ASIDE FROM YOUR ROLE AS A CROWN ATTORNEY. AS I SEE IT, AND I HAVE TRIED TO OUTLINE THAT FOR YOU, YOU MUST NEVER LOSE SIGHT OF THE FACT THAT THE DEFENCE COUNSEL, AS A MATTER OF PROFESSIONAL OBLIGATION, IS INTERESTED ONLY IN OBTAINING AN ACQUITTAL WITHIN THE LIMITS OF THE LAW AND ETIQUETTE, WHEREAS YOU, AS A CROWN ATTORNEY, ARE INTERESTED IN JUSTICE AND JUSTICE ALONE. THESE INTERESTS, OF COURSE, DO NOT COINCIDE AND YOUR END IS THE MUCH MORE DIFFICULT TO ACHIEVE. YOUR CONDUCT THROUGHOUT A PROSECUTION MUST BE GOVERNED BY THE PRINCIPLE WHICH WE HAVE ACCEPTED AS THE FOUNDATION OF OUR CRIMINAL LAW, NAMELY THAT EVERY MAN IS INNOCENT UNTIL PROVEN GUILTY BEYOND A REASONABLE DOUBT. IT IS THIS PRINCIPLE WHICH, IN MY VIEW, DICTATES YOUR RELATIONS WITH DEFENCE COUNSEL. IT MAY STICK IN YOUR THROAT SOMETIMES TO MAKE THE OVERTURES THAT I HAVE SUGGESTED, BUT IN THE LONG RUN YOU WILL GAIN SATISFACTION FROM KNOWING THAT YOUR CLIENT IS JUSTICE AND YOU



HAVE SERVED HER WELL.

THE CROWN ATTORNEY AND THE BILL OF RIGHTS - NEW DIRECTIONS

I HAVE TRIED TO OUTLINE FOR YOU YOUR ROLE IN THE ADMINISTRATION OF JUSTICE AS I SEE IT. I HAVE ALSO TRIED TO EMPHASIZE YOUR CONCERN WITH JUSTICE IN ITS PUREST FORM BECAUSE I FEEL THAT IN OUR CHANGING SOCIETY WE WILL HAVE TO DEMONSTRATE A RESPONSIVENESS AND RECOGNITION TO THE RIGHTS OF ALL THOSE WHO COME BEFORE THE COURTS. THERE IS PRESENTLY IN MY VIEW, AN OPPORTUNITY FOR THE CROWN ATTORNEY TO DEMONSTRATE ONCE AND FOR ALL THAT HE IS NOT SOLELY A LAWYER FOR LAW ENFORCEMENT AGENCIES, BUT RATHER THE SERVANT OF THE PUBLIC AT LARGE AND THE KEY MAN IN THE ADMINISTRATION OF A FAIR AND JUST CRIMINAL LAW SYSTEM. IT WILL BE HIS RESPONSIBILITY ABOVE ALL TO MAKE THAT SYSTEM WORK SO THAT THE PUBLIC RECOGNIZE THAT IT NOT ONLY PROTECTS THEM, BUT IS FAIR AND JUST IN ITS OPERATION. I HAVE EMPHASIZED IN MY REMARKS WHAT I BELIEVE TO BE THE ENGLISH APPROACH TO THE ROLE OF THE PROSECUTOR. MY REASON FOR DOING THIS IS THAT IT IS MY OPINION, ALTHOUGH THIS IS NOT UNIVERSALLY SHARED, THAT THE DECISIONS OF THE SUPREME COURT OF CANADA IN THE DRYBONES CASES AND MORE RECENTLY IN THE BROWNRIDGE CASE, HAVE ESTABLISHED THAT THE BILL OF RIGHTS AT LAST IS GOING TO BE PUT INTO PRACTICE IN THIS COUNTRY. THE PRACTICES AND PROCEDURES FOLLOWED IN THE CRIMINAL COURTS ARE GOING TO BE ASSESSED IN THE LIGHT OF THE PRINCIPLES LAID DOWN IN THAT STATUTE. THE FUNDAMENTAL PRINCIPLE THAT A MAN BE DEEMED





INNOCENT UNTIL PROVEN GUILTY WILL SUPPLEMENT THE BILL OF RIGHTS WHERE IT IS SILENT AND OUR COURTS WILL, IN MY VIEW, REQUIRE THAT THE PRACTICES AND PROCEDURES BEING FOLLOWED MEET THOSE FUNDAMENTAL PRINCIPLES. THE ATTORNEY GENERAL AND THE CROWN ATTORNEYS ARE THE MEN IN OUR SOCIETY WHO ARE MOST CLOSELY CONNECTED WITH THE ADMINISTRATION OF THE CRIMINAL LAW, AND I SINCERELY HOPE THAT WE CAN LEAD THE WAY IN APPLYING THOSE PRINCIPLES IN THE DAY TO DAY OPERATION OF THE CRIMINAL JUSTICE SYSTEM. FOR TOO LONG NOW IT HAS BEEN OUR LOT TO REACT TO COURT DECISIONS AFTER THE EVENT. IF I AM CORRECT IN MY CONCLUSION THAT THE ROLE OF THE CROWN ATTORNEY IN THE ADMINISTRATION OF JUSTICE IS THAT OF A LOCAL MINISTER OF JUSTICE, THEN I BELIEVE I AM ENTITLED TO EXPECT THAT YOU WILL TAKE THE INITIATIVE IN ENSURING THAT THOSE TRIALS WHICH TAKE PLACE IN THE COURTS FOR WHICH YOU ARE RESPONSIBLE MEET THOSE FUNDAMENTAL PRINCIPLES WHICH WE ALL HOLD DEAR. IN OPENING I INDICATED BOTH YOU AND I ARE NEW TO OUR RESPECTIVE RESPONSIBILITIES. THE FACT WE ARE NEW GIVES US AN OPPORTUNITY TO TAKE THE INITIATIVE IN MEETING THE CHALLENGES THAT SOCIETY IS GOING TO PUT BEFORE US. I AM SATISFIED THAT IF YOU ALIGN YOURSELF WITH THE CAUSE OF JUSTICE ALONE, YOU WILL NEVER REGRET UNDERTAKING THE PUBLIC DUTY WHICH MR. JUSTICE RAND SO ABLY DESCRIBED AS BEING "THAT IN WHICH IN CIVIL LIFE, THERE CAN BE NONE CHARGED WITH GREATER PERSONAL RESPONSIBILITY." THERE IS NO MORE DIFFICULT ROLE IN THE ADMINISTRATION OF JUSTICE THAN THAT OF CROWN ATTORNEY, BUT IT IS ALSO EXCITING, CHALLENGING AND WHEN CONSCIENTIOUSLY DISCHARGED, IT CAN BE MOST SATISFYING.



THE CAREER PROSECUTOR OF CANADA

HENRY H. BULL, Q.C.

(The author spent his professional career associated with the Administration of Justice in the Province of Ontario, latterly as Crown Attorney for Metro Toronto and the County of York. He was renowned as a brilliant and forceful advocate. As will appear from his remarks, he was, as well, interested in the historical aspects of the Administration of Justice in this Province.

This article is from an address given by Mr. Bull at the Short Course for Prosecuting Attorneys at the North Western University School of Law on July 31, 1961.

Mr. Bull passed away suddenly in Toronto in September of 1968.)

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Not every prosecutor in Canada is a career man. There are those who look upon the position as a temporary training ground, prolific of experience -- as a transitory step in a broader legal career -- as a part-time adjunct to bolster an inadequate practice -- or as a refuge from the rigours of a competitive profession. There are those, however, of whom I like to count myself as one, who with a sense of dedication consider this their avocation, who bridle at the question so often asked by the Perry Masons acting for the defence "when are you going to quit prosecuting and get on the right side?" Never, in nearly a quarter of a century has it ever occurred to me that I was on the wrong side.

In making comparisons of the Canadian and American prosecutors, it must not be taken that I make any claim to the superiority of the Canadian System or that I am critical of any other. Any partiality I may show is that natural preference that one has for what is familiar to him and what is his own.

It might perhaps have been expected that the difference between us would be obvious -- that the image of the Canadian prosecutor was an integral part of the picture of rough and ready barrel-head justice being meted out to parka-ed and muk luk-ed Eskimos by an itinerant magistrate who, while flanked by red-coated Mounties, raps for order on a cask of whale blubber with a frozen seal fin.

On the contrary, it is the similarities which are obvious and the differences which are difficult of discernment.



## AN HISTORICAL ANALYSIS OF THE ADMINISTRATION OF JUSTICE IN CANADA

### Similarities with the United States

The judge, the jury, the witness, the accused and his counsel, the prosecutor, each plays his part and follows the same script that, making allowance for the peculiarities of local custom, you are so familiar with at home.

There you recognize the same methods of proof, the same rules of evidence, the same trial technique, the same presumption of innocence, and as you heard the judge's rulings solemnly sounding through the courtroom like an echo from your own, you would realize that this too was a court not only of law, but of justice.

This similarity is founded in history -- founded in the common heritage we share of the English Common Law, with its beginnings in the customs and practices of the fields and farms and roads and villages of our Anglo-Saxon and Norman forebears, who realized that freedom is not so much a matter of the formulation of sonorous abstractions, as of protecting the rights of each single person in the state, and that the test of freedom lies in the rights of the individual and in the readiness of the law to uphold them.

This similarity is also founded in the constant progress towards the democratic ideal.

Four centuries after Magna Carta this concept was brought to these shores by the first settlers who, with their successors, imbued with a zeal for freedom, and endowed with pioneer energy forged it into the guarantees that are commonplace today and are common to our two nations: the maintenance of right -- the liberty of the individual -- the dignity of man.

### Differences with the United States

But, as you sat in that courtroom and watched the prosecutor, the Crown Attorney, in traditional gown of barrister's stuff or Q.C.'s silk, ply his trade before the judge and jury, examining and cross-examining, objecting, submitting, pleading, arguing very much as you would, you might ask yourself "Are we the same? Does that title, Crown Attorney, have a significance I cannot see? Do those black robes discreetly conceal a subtle difference, a difference which is a reflection of the fundamental difference of the Political philosophy of our two countries?"

Although we can be said to be equally successful in arriving at our present stage in the development of democracy, we have done so by means that are remarkably dissimilar. Let us explore for a moment the paths of our constitutional histories.





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The birth of the American nation was accompanied by a drastic and complete severance with the Mother Country. The basic principles of its system of government, conceived in a spirit of national independence, were firmly established by the end of the 18th century and reflected the political philosophy of the era. American institutions rest on the assumption that the whole job of representing the will of the people should not be entrusted to one authority, that the essence of good government lies in the division of power by a system of checks and balances.

On the other hand, the transition of Canada from colony to nation has been a much more gradual process of constitutional evolution. It was not until 1867 that the Dominion of Canada as a federation of provinces was created. Even then it did not achieve sovereign statehood. Its foreign affairs were still controlled exclusively by Britain, and even in its domestic matters it was not entirely free. The evolution continued, however, until independent national status was recognized at the end of the First World War and ultimately confirmed by the Statute of Westminster in 1931.

Canada now is a completely autonomous constitutional monarchy, holding equal status with Great Britain and the other nations in the British Commonwealth.

Her political system has been fashioned in the main after the British constitutional tradition as it had developed through the 18th century and on into the 19th. There Parliament had succeeded in taking over most of the powers of the King. Cabinets made up of elected representatives of the people and responsible to Parliament gained complete control over the executive branch of government, and in addition, as leaders of an increasingly well disciplined party majority, they were able to direct the legislative activities of Parliament.

This constitutional tradition came to be based on not the separation but the fusion of powers. Instead of balancing power against power, democracy was achieved by making the Prime Minister and his Cabinet fully responsible for carrying out the will of the electorate. All of which being done in the name of the Crown.

It is in this context that we should once more look at the black-robed figure of the prosecutor in the courtroom. But before we strip him of his trappings, let us take another brief glance into history to help us better understand what we shall see.



At the end of the American War of Independence, only a generation after the conquest of New France by the British and the establishment of the rule of law for both victor and vanquished, there came the impact of the migration of thousands of Loyalists from south of the border. Settling in the Maritimes along the Atlantic Coast and in the central region now known as Ontario, but then called Upper Canada, they brought with them not only their original English heritage but the heritage of a hundred eighty years of development in the American colonies towards freedom and liberty. They shared the same zeal as the framers of the Declaration of Independence for the ideals to be desired, but differed violently as to the manner in which these ideals were to be attained. They were not prepared to abandon the institution of the monarchy and preferred to achieve their ends by constitutional means.

Whether they came from the rugged frontier with its pioneer ways or from the older colonies where life had been settled and refined if not effete, they all had this in common: they all had been prepared to stand by their principles, many of them to fight for them, and, stripped of their homes, their goods, their wealth, were prepared to make a new start in a new and unknown land. With none of the facilities, comforts, or amenities to which many of them had been accustomed, they began with axe and adze to hew a home for themselves out of the wilderness.

But more important than the homes they built was the framework of government they erected. English Civil Law and trial by jury were quickly established, and the foundations were soon laid for representative and local government.

It has been said by some that this early establishment of local government by the Loyalists in central and eastern Canada may be one reason why those pioneer provinces differed in many respects from the frontier areas of the United States.

The bitterness engendered by the war made them look with suspicion on the institutions created by the American Constitution, and they therefore leaned heavily towards the basic principles then extant in England.

Having seen an electorate become what they considered a band of mutinous rebels, they were slow to place the power directly in the hands of the majority. It took them half a century to fully accomplish representative and responsible government. They shied away from the elective process for any office, judicial or administrative, and reserved it only for their representatives in the legislatures and municipal councils.



It was in this climate that the young country grew, a climate modified by the influence of the War of 1812, which nurtured a sense of national identity; by the influence of the non-Loyalist immigrants from south of the border with their leanings towards republican and more democratic forms of government; and by the influence of the arrival of tens of thousands of immigrants from the British Isles with their strong feelings for monarchy.

### A Need for a County "Prosecutor"

By 1857, ten years before Confederation, the growing population, with the concomitant growing business of the criminal courts, was pushing settlement and civilization farther and farther into the remoter parts of the country, away from the shoreline of the natural inland waterway of the Great Lakes. Means of travel and communication were still in an elementary state. They consisted for the most part of water, horse, and stage coach; the railroad just completed between Toronto and Montreal was as yet of little value in reaching the hinterland. Roads were either non-existent or primitive and often impassable, due to lack of development and to the rigours of the climate.

All of this made it increasingly difficult for the law officers of the Crown -- the Attorney-General and his agents, located at the central seat of government -- to attend effectively to their duties with respect to the administration of justice in the remoter parts of the province.

Provision was therefore made for the appointment of a Crown Attorney for each county in the province to aid in the local administration of justice. The powers and duties then assigned to him have remained substantially the same until the present day.

The office was indigenous to Ontario. There was and still is in England no similar provision for a uniform system of permanent officials appointed for the local administration of justice. The law officers of the Crown -- the Attorney-General, the Director of Public Prosecutions (an office which post dates the office of Crown Attorney), and Crown counsel appointed ad hoc for a particular place, a particular sitting, or a particular prosecution -- perform some of the functions of a Crown Attorney but not all. There is still a considerable amount of resistance in England to the idea of professional prosecutors, whether they be temporary or permanent.

In the rest of Canada today the other provinces have either followed the pattern created in Ontario or have developed systems of their own adapted to their local requirements.

### The Northwest Mounted Police

This force, originally known as the North West Mounted Police, was created in 1873 to forestall any trouble in our West with the Indians and with the lawlessness that you were experiencing on your own frontiers. We were fortunate that the first settlers, being primarily interested in fur-trading, had established and maintained relatively amicable relationships with the Indians for economic





reasons. The population was sparse and the infiltration of new-comers gradual, with no great trek or mass movement towards the mountains and the West Coast. Canada was spared a civil war of her own, and the upheaval caused by yours was not felt to any great degree north of the border.

The Mounted Police, a thoroughly trained, semi-military force under rigid discipline, early earned the respect of settler and Indian alike with a reputation for effectiveness, impartial fairness, and above all, for incorruptible integrity.

This reputation they still enjoy today. Their operations have been extended from the original policing of our western frontiers to those of a national police force. As such they concentrate their efforts on such matters as national security, immigration, customs and excise, revenue and coinage offences, and the narcotic drug traffic.

In addition they operate under contract in eight of the ten provinces as provincial police (Ontario and Quebec have their own forces), policing generally wherever there are no, or inadequate, local or municipal forces to do so. In the smaller communities and sparsely settled areas where there is no full time prosecutor, they perform his functions with respect to minor offences, which make up the vast bulk of the work of the inferior courts. In the remote northern areas they also act as justices of the peace.

The familiar red-coated figure of the Mountie not only has become the national trade mark of Canada to the rest of the world, but also at home is a symbol of law and order contributing in no small measure to the respect in which the law is generally held.

#### THE CRIMINAL LAWS OF CANADA: ENFORCEMENT AND ADMINISTRATION

##### The Criminal Code

One of the specific fields assigned to the Federal Parliament is that of criminal law and procedure. Under that authority have been enacted the Criminal Code of Canada and certain other statutes dealing with specific matters, such as trade combines and narcotic drugs; in all of these statutes is embodied the whole of the criminal law, both substantive and procedural, which is uniform for the whole country.

The provinces have no authority to legislate in the field of criminal law, although they may provide for penalties including fines and imprisonment for the enforcement of legislation made in pursuance of their specific powers. These offences are referred to as quasi-crimes, since they are dealt with in the same manner as minor offences under the Criminal Code. Specific examples are to be found in traffic and liquor offences.





## The Court System

When it comes to the enforcement of the law and the administration of justice there is a shift in the emphasis. These matters fall within the exclusive legislative powers of the individual provinces.

In each province this power includes the constitution, maintenance and organization of the provincial courts of both civil and criminal jurisdiction.

Each province has set up its own juridical system of trial and appellate courts at all levels. Although individual to their respective provinces, these systems are virtually the same. Generally speaking there are three levels of criminal courts, and although the names vary from province to province, their respective jurisdictions are similar throughout the country. Reference can be made therefore, for the purpose of illustrations, to those in Ontario.

The Supreme Court, which is the top echelon, has jurisdiction to try any indictable offence. This distinction between felony and misdemeanour having been abolished in Canada, all offences are divided into two classes depending on the method of trial: indictable offences, which embrace the more serious and general crimes; and summary conviction offences, which are the lesser offences. The Supreme Court has exclusive jurisdiction to try the graves of the indictable offences -- murder, manslaughter, treason, rape and the like -- and, as a general rule, persons accused of these last-mentioned offences must be tried by a court composed of a judge and jury.

Jurisdiction at the lowest echelon is exercised by the Magistrates' Courts. In addition to all summary conviction offences, of which traffic offences make up the greatest part, magistrates have absolute jurisdiction to try a number of indictable offences, such as petty theft, assaults, gambling, prostitution, and so on. In addition, on the election of the accused, a magistrate may try any person charged with an indictable offence other than those expressly declared to be within the exclusive jurisdiction of the Supreme Court.

Since trials in the Magistrates' Courts are summary and speedy, by far the greatest majority of cases, estimated at 90 to 95 per cent of all criminal trials, are heard by a magistrate sitting without a jury.

Where a person is accused of an indictable offence which is within the exclusive jurisdiction neither of the Supreme Court nor of the magistrate, he may elect to be tried by a court composed of a County Court Judge sitting with a jury -- known as the General Sessions of the Peace -- or a County Court Judge sitting alone without a jury -- known as the County Court Judges' Criminal Court. Both these courts exist in every county.



Appeals from convictions in all of these courts may be taken to the provincial Court of Appeal, in some instances as of right, in others only with leave of the Court. The Crown may appeal from acquittal on questions of law but not from findings of fact.

Appeals may be taken from the provincial Courts of Appeal on questions of law to the Supreme Court of Canada.

Selection and Tenure of Judges, Crown Attorneys and Assistant Crown Attorneys.

#### Judges and Court Officials

The constitution requires that the judges of the Superior, County and District Courts in each province be appointed by the Dominion Government for life (which presumed to end at 75) and to hold office during good behavior. They can be removed only by impeachment. The magistrates are appointed by the Province for life and good behavior. All other court officials, clerks, sheriffs, bailiffs, and the like are appointed by the Province during pleasure. Into this category in Ontario fall Crown Attorneys and their assistants.

#### Crown Attorneys

Although I have said the appointment of the Crown Attorney is a provincial one, it is, in effect, an appointment by the Crown. Canada being a constitutional monarchy, governmental authority rests in theory in the monarch, who cannot act alone, but only by and with the advice of her ministers, who are elected representatives responsible to Parliament, and whose advice she never rejects.

Being otherwise engaged on the other side of the Atlantic, the Queen carries on her function of government in Canada through her representatives. In federal matters she is represented by the Governor General, who is advised by the Privy Council for Canada, made up of the Prime Minister and his Cabinet. In provincial matters she is represented by the Lieutenant-Governor (not to be confused with your nomenclature), who is advised by the Executive Council, made up of the Premier of the Province (the equivalent of your Governor) and his Cabinet.

The appointment of Crown Attorneys is made by the Lieutenant-Governor-in-Council, which is to say, by the Queen, on the advice of her ministers. In practice the Attorney General of the Province, who is a Minister of the Crown, makes his choice of a suitable member of the Bar in good standing and recommends his nominee to his colleagues for confirmation by Order-in-Council.



The appointment is during the pleasure of the Lieutenant-Governor, who it seems is very easy to please. Recently a Crown Attorney retired on pension after over forty years in office; another is still going vigorously at the age of 80 or better. In my own jurisdiction the present incumbent is only the third to hold the office since the first World War. He has been Crown Attorney for eleven years, prior to which he was an Assistant for twenty-one years.

Removal from Office must also be by Order-in-Council and other than for obvious reasons of health or age would be formal feaseance or misfeaseance.

#### Assistant Crown Attorneys

The appointment of Assistants is made similarly to that of Crown Attorneys, that is to say by the Lieutenant-Governor in Council, to hold office during pleasure. They may be employed full-time or part-time as the local need demands. In York County, where I come from -- a jurisdiction of close to 1 3/4 million people -- there are 12 full-time and several part-time Assistants.

When the need arises for replacements or additions, the Crown Attorney makes a selection on a basis of merit from those members of the Bar who have applied for or who he knows are interested in the position. His recommendation is then made to the Attorney General, who usually accepts it.

There is less permanency among Assistants than among the Crown Attorneys, inasmuch as many of them look upon the job as a temporary training period for a career of advocacy, others are not content with the modest emoluments of the position, and still others turn out to be unsuited. On the other hand there are those who, as I have done for twenty-two years, make it a career.

The Assistants act under the direction of the Crown Attorney and when so acting have the like powers and perform the like duties as he does. Everything I now say, therefore, about the nature and function of the office of Crown Attorney applies with equal force to his Assistants.

#### Appointment of Crown Attorneys Non-political

The office is non-political, except in so far as an Attorney General is apt to show some preference for members of his own party when making an appointment. I know of many cases where persons of opposite political stripe have been appointed, but it has been many years and before my recollection since anyone has been fired for political reasons. The patronage system is rapidly becoming a thing of the past, and all civil servants, federal and provincial, enjoy the same sort of security. This we believe makes for stability of administration.





### He is Not a Policeman

The Crown Attorney is not a law enforcement officer; that is a policeman's function. He is not a gangbuster, nor is he bent on ferretting out the law-breaker and bringing him to the bar of justice. He has no investigatory staff of his own, and although he necessarily works in close conjunction with the local police in the preparation of cases and their prosecution to a proper conclusion, he has no jurisdiction or authority over them.

He may, and quite frequently does, give advice to persons, including police, who wish to lay charges, as to whether a criminal offence is disclosed by the facts, whether a prima facie case is made out, and whether a prosecution is justified. If he finds that these things are so, he refers the person to the police for further action or directly to a justice, who will exercise his discretion as to whether he will issue his process.

For all practical purposes it can be said that the Crown Attorney comes into the picture after the proceedings have been commenced. He then assumes the responsibility for the prosecution, doing all things requisite for the speedy, efficient, and proper disposition of the case. In this he is assisted by the police in charge of the case who, although he has no authority over them, willingly accede to his requests and take his direction for investigation and preparation. He however takes no direct part in the investigation such as taking statements or confessions from accused persons which I understand is the practice in some of your jurisdictions. Such matters he leaves to the police.

He, then, is the attorney for the people or the State against the accused in a proceeding in which the State dissociates itself from the act of its own member, denouncing his conduct and exhibiting an antagonism in its will against the will of the wrong-doer.

### He Is An Attorney For The Crown

The Crown Attorney however is something more. The Crown embraces the whole of the state including the wrong-doer himself. On the one hand the monarch, in return for the fealty and allegiance of the subject, guarantees that the subject shall enjoy peace -- the Queen's Peace. On the other hand the monarch has repeatedly guaranteed to every subject, since King John affixed his seal to the great Charter on the meadows of Runnymede, the right of fair trial and due process of law.

It is in this sense that I and my colleagues are attorneys for the Crown.

All criminal prosecutions are carried on in the name of the Crown and are styled "The Queen against John Doe" or sometimes in Latin, Regina versus Doe.





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The retention of this terminology I consider to be important. As the Crown symbolizes for the people their principles, rights, and liberties, the carriage of the symbolism into the Courts helps to maintain and preserve a respect for the law.

We have retained a measure of the tradition and ceremony of the English Courts, which again enhances the dignity of the law and its place in the community. Our Judges wear robes of different colours, robes according to the courts in which they sit, and the lawyers, when appearing in the higher courts, wear black gown, wing collars, and white Geneve tabs, but have discarded the wig. The Sheriff, who attends the judge in court, wears a cocked hat and frock coat and carries a sword.

Even out of court, judges affect a semi-formal attire, wearing, except on the most informal occasions, director's suit (black jacket and striped trousers, with black homburg hat).

In Toronto every year just after the New Year, on the day of the opening of the Winter sittings of the Supreme Court, known as Assize, and Nisi Prius, Oyer and Terminer and General Goal Delivery, a special service is held in one of the downtown churches, attended by the Lieutenant-Governor, the Attorney General, the judges and magistrates of all the courts, Supreme, County and Municipal -- all in their robes --, the Benchers of the Law Society, Court Officials, and members of the legal profession. It is a dignified and impressive affair, which strikes an appropriate key-note for the ensuing transaction of the business of the Courts.

#### He Is a Minister of Justice

A criminal prosecution in our law is not a contest between individuals, nor is it a contest between the Crown endeavouring to obtain a conviction and the accused endeavouring to be acquitted.

The position of the Crown Attorney is not that of ordinary counsel in a civil case; he is acting in a quasi-judicial capacity or as a minister of justice and ought to regard himself as part of the Court rather than as an advocate. He is not to struggle for a conviction nor be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority and a contest of skill and pre-eminence.

He is present in court to present the case for the Crown and has a discretion to do so as he sees fit. This discretion must be exercised with a feeling of responsibility to assist the judge in fairly putting the case before a jury. He also has a discretion to decide what witnesses should be called and what evidence is relevant, credible, and material, and his discretion will not be interfered with unless it is exercised with some oblique motive. But he has a duty to offer all the relevant evidence no matter how it may tell -- against the



accused or in his favour -- and to call all credible and material witnesses to the occurrence even if they are likely to give different accounts of what took place. He must not hold back or suppress credible evidence that would assist the accused.

Fairness, moderation, and dignity should characterize his conduct throughout. He is engaged in an investigation which should be conducted without feeling or animus on the part of the prosecution with a single view of determining the truth.

This is not to say that the Crown must be supine in the performance of his duties. As Lord Eldon said:

"Truth is best discovered by powerful statements on both sides of the question."

The adversary system is fundamental to the Anglo-American forensic process.

Vigour is frequently demanded to see that the court is not misled -- that the course of justice is not warped. Counsel must not be hoodwinked by those who, while affecting to tell the truth are really twisting facts to help the prisoner, and he must assiduously cross-examine the witnesses for the defence to find out how far they can be relied upon. He must be alert stalwartly to oppose the counsel who allows his duty to his client to transcend his duty to the Court, to the State, and to his conscience.

Finally, when he has brought out all the facts thoroughly, argued his points of law intelligently and effectively, he is entitled in his final address to the jury to examine all the evidence and to ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language his own personal opinion that the accused is guilty.

### Conclusion

In a recent trial for murder, Crown Counsel allowed himself to be carried away by the ardour of battle to the point that, having already indicated his personal belief in the guilt of the accused, he had this to say (this is a translation of the original French):

"Every day we see more and more crimes than ever, thefts, and many another thing. At least, one who commits armed robbery does not make his victim suffer as Boucher made Jabour suffer. It is a revolting crime for a man with all the strength of his age, of an athlete against an old man of 77, who is not capable of defending himself. I have little respect for those who steal when they have at least given their victim a chance to defend



himself, but I have no sympathy for these dastards who strike men, friends -- Jabour was perhaps not a friend, but he was a neighbour, at least they knew each other -- in a cowardly manner with blows of an axe.

".....(A)nd if you bring in a verdict of guilty, for once it will be almost a pleasure for me to ask the death penalty for him."

The Supreme Court of Canada quashed the conviction and ordered a new trial. Mr. Justice Rand had this to say:

"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate length but it must be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of the judicial proceedings."

The achievement of these ends is our endeavour, these ideals our aspiration. To them we bring, imperfect as our human frailty dictates, our intellects, skills and knowledge, an understanding of our fellowman, a compassion for the weakness of the wrong-doer, and a sympathy for his victim, a dignity, a courtesy, a fairness, respect for the law, and a fearless courage for what is right -- but above all -- integrity.

This is our career.

(From (1962) 53 Journal of Criminal Law, Criminology and Police Science, pages 89 to 96).





THE CAREER PROSECUTOR OF CANADA

HENRY H. BULL, Q.C.

(The author spent his professional career associated with the Administration of Justice in the Province of Ontario, latterly as Crown Attorney for Metro Toronto and the County of York. He was renowned as a brilliant and forceful advocate. As will appear from his remarks, he was, as well, interested in the historical aspects of the Administration of Justice in this Province.

This article is from an address given by Mr. Bull at the Short Course for Prosecuting Attorneys at the North Western University School of Law on July 31, 1961.

Mr. Bull passed away suddenly in Toronto in September of 1968.)

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Not every prosecutor in Canada is a career man. There are those who look upon the position as a temporary training ground, prolific of experience -- as a transitory step in a broader legal career -- as a part-time adjunct to bolster an inadequate practice -- or as a refuge from the rigours of a competitive profession. There are those, however, of whom I like to count myself as one, who with a sense of dedication consider this their avocation, who bridle at the question so often asked by the Perry Masons acting for the defence "when are you going to quit prosecuting and get on the right side?" Never, in nearly a quarter of a century has it ever occurred to me that I was on the wrong side.

In making comparisons of the Canadian and American prosecutors, it must not be taken that I make any claim to the superiority of the Canadian System or that I am critical of any other. Any partiality I may show is that natural preference that one has for what is familiar to him and what is his own.

It might perhaps have been expected that the difference between us would be obvious -- that the image of the Canadian prosecutor was an integral part of the picture of rough and ready barrel-head justice being meted out to parka-ed and mukluk-ed Eskimos by an itinerant magistrate who, while flanked by red-coated Mounties, raps for order on a cask of whale blubber with a frozen seal fin.

On the contrary, it is the similarities which are obvious and the differences which are difficult of discernment.



THE CROWN PROSECUTORKEY MAN IN LAW ENFORCEMENT

W. B. Common, Q.C.

(The writer for many years was the Deputy Attorney-General of Ontario).

The position of the Crown Prosecutor and the history of criminal prosecutions in the administration of Criminal Justice has, to a large extent, escaped the attention of the legal writers. This neglect is no doubt due to the fact that the conduct of criminal proceedings in England is somewhat different from that which exists in Canada, both historically and at the present time.

Since this article deals with Crime and Criminal Prosecutions it may be wise to define what is meant by crime and a criminal prosecution.

"To define crime is a task which so far has not been satisfactorily accomplished by any writer. But it may be described, although not defined, as a result of human conduct (active or passive) which it is the policy of the governing power in the State to prevent."

The law of the County prohibiting a course of conduct by its citizens also, of course, provides penalties for those who fail to obey the law.

By Criminal Prosecution is meant the proceedings established by law whereby an accused person is either found guilty or is acquitted of the charge which the State has seen fit to bring against him, but the concern of the State with an accused person is not that of an umpire awarding damages to right a private wrong, but that of the community in relation to one of its members who has offended against an order of its life. The State represents not only the injured party but all the other citizens of the State; it acts for the whole, including the offender himself.

This situation is liable to be obscured by the fact that those who actually frame and pass laws are, for the most part, reputable citizens who are not expected, and themselves do not expect, to fall under the operation of the laws which they enact. Consequently, there may be an impression that one group of citizens is enacting laws for the control of another group or that the respectable are inflicting vengeance upon the malefactors. The true significance of criminal legislation is something very different from that; it is that the whole community comprising all its members and acting through their representatives, enacts certain penalties against any of those members who shall offend in specified ways.



The essence of punishment too is the reaction of the State as representing society against a constituent member, not of one group or group of members against another. The State has three interests to consider. Firstly -- the maintenance of its own life and order upon which the welfare of all its members depends; secondly, the interest of the individual members generally and, thirdly, the interest of the offending member himself, and wrong is done if any of these factors are neglected.

In England, prior to 1829, generally speaking, there was no organized body charged with the responsibility of preventing or investigating crime, or to prosecute offenders; these duties were left to the individual citizen to be discharged at his own expense.

Fielding in his essay on the causes of the increase of robberies during the 18th century, says:

"This I have known to be so absolutely the case that the poor wretch who hath been bound to prosecute, was under more concern than the prisoner himself. It is true that the necessary cost on these occasions is extremely small, two shillings, which are appointed by an Act of Parliament for drawing the Indictment being, I think, the whole which the law requires, but when the expense of attendance, generally with several witnesses, sometimes during several days together, and often at a great distance from the Prosecutor's home; I say, when these articles are summed up, and the loss of time added to the account, the whole amounts to an expense which a very poor person, already plundered by the thief, must look on with such horror...that he must be a miracle of public spirit if he doth not rather choose to conceal the felony, and sit down satisfied with his present loss."

The Metropolitan Police Act of that year established a Police Force for the City of London, but the basic principle still prevails, namely, that the responsibility for the prosecution of criminal offences is left largely to private citizens, aided by the various Police Forces, the Home Office, and the Attorney-General; the Director of Public Prosecutions, an official created by statute, is only bound to prosecute generally speaking, capital offences. In the ordinary cases, Crown Counsel is assigned and the costs of the prosecution are paid out of local funds.

In Ontario and in most of the other Provinces in Canada, the responsibility for law enforcement is primarily that of the various Police Forces, whose duties are provided for by common law and statute. That is to say, they must enforce laws of general application within the Province. At the expense of digressing for a moment, I would point out however that it is not the duty of a Police Officer to personally lay charges in every instance a crime is alleged to have been committed. The principle that the responsibility for criminal prosecutions, is that of the private citizen, exists here as in England, and





a Police Officer is not obliged to lay a charge in every case where a citizen believes that a criminal offence has taken place; the citizen should, in such cases, lay the charge himself, especially in those cases where he is the injured party.

Under the provisions of The British North America Act, an Attorney-General, the chief law officer of the Crown, is provided for each Province, and the administration of criminal justice is his responsibility, which includes the prosecution of indictable offences under Dominion law, i.e., The Criminal Code of Canada.

Since it is impossible for an Attorney-General to personally attend to each prosecution his duties in this regard are delegated with statutory approval to his Counsel the Crown Prosecutor or Crown Attorney.

We have in Ontario, Counties and Districts in each of which is located a Crown Attorney who is the direct representative of the Attorney-General in his own locality. It is his duty to prosecute all indictable offences within his territorial jurisdiction and those summary conviction offences where his services are directly retained by the complainant or informant.

The Crown Attorney or Crown Prosecutor in Canada, unlike his opposite number in some of the United States of America, does not invade the realm of the investigating police, but after the police investigation is complete, the police officer in charge of the case lays the matter before the Crown Attorney or Prosecutor, who advises what charge or charges should be laid under the circumstances, before the appropriate Justice of the Peace.

It is not until a person accused of an indictable offence appears before the Justice or Magistrate that the functions of a Crown Prosecutor really commence. He appears for the prosecution at the preliminary enquiry before the Magistrate if the accused elects trial by a jury, and conducts the prosecution if the accused elects summary trial by the Magistrate.

Under our system of criminal practice in Canada, an accused charged with an indictable offence may elect trial by a higher tribunal than the Magistrate's Court, i.e., the Court of the General Sessions of the Peace (Judge and Jury) or the County Judge's Criminal Court (Judge without a Jury), and in capital cases, i.e. Murder, Manslaughter, Rape and certain other offences, the accused person must be tried at the Assizes by a Supreme Court Judge and Jury. It is again in these circumstances that the local Crown Attorney assumes the role of Crown Prosecutor. He has the conduct of the trial and a grave and solemn duty to perform.





It has often been said by those in high authority that a criminal trial is not a contest between the Crown on the one hand and the accused on the other, but rather a judicial investigation to ascertain whether the accused person has been guilty of the offence with which he stands charged. I must confess with due humility, that I cannot wholly subscribe to this somewhat lofty and, incidentally, wholly theoretical description of the pattern which a criminal trial should take. My inability to accede to this is due to several factors, the chief of which is the present-day methods adopted by professional criminals and the underworld, which have never been noted for their assistance in the proper administration of criminal justice and the attitude of some defence counsel, that a criminal trial is both a battle of wits and a game with no holds barred. It seems that as a matter of ethics, the Crown must, of course, be scrupulously fair whereas the defence may resort to and adopt any tactics to defeat the Crown's case. I hasten to reassure my learned friends for the defence that there is no imputation whatever as to their personal conduct. They, of course, receive instructions from their clients and are bound to follow them.

It frequently happens that the character of an accused person is well known to the Prosecutor and the methods he is capable of adopting including perjury, in order to escape conviction and punishment for a crime which, to the knowledge of the Prosecutor, he is both legally and morally guilty. Such circumstances, therefore, in my opinion, call not for a casual and somewhat anaemic enquiry, but for conduct on the part of the Crown Prosecutor demanding vigour, alertness and determination that the real facts properly adduced in evidence are revealed by his skill in examining witnesses for the Crown, and by a searching and exhaustive cross-examination of an accused and any witness brought forward on his behalf, who endeavours to concoct a simulated defence.

The first duty of the State is to dis-associate itself from the act of its own member and to do this it must act in a forthright manner against that member. Because he is a member of the community his criminal act implicates that community unless the State repudiates his action. Thus the State must exhibit an antagonism in its will against the will of the offending member. This antagonism, in my opinion, is absolutely necessary for the preservation of its own character, on which the character of the citizens of the State largely depends.

A Crown Prosecutor therefore, on behalf of the State, must do his part in a system which clearly denounces the conduct of its offending member.

At the risk of being accused of being prejudiced, I sometimes feel that our system of criminal jurisprudence, is, in many respects, too favourable to an accused person and unfair to the State, thus making the task of the Crown Prosecutor well nigh impossible in some cases.



To name a few:

- (1) The seeming over-cautious approach by the judiciary in respect to confessions resulting in their being ruled inadmissible in many cases.
- (2) The technical application of the doctrine of autrefois acquit and convict.
- (3) The Law of Canada as contrasted with that in England,
  - (a) Provocation
  - (b) Receiving Cases

These and other principles so favourable to an accused often frustrate the Crown Prosecutor in establishing the truth beyond reasonable doubt, resulting in an acquittal of the accused and miscarriage of what might be termed "natural justice".

#### THE RESPONSIBILITIES OF THE CROWN PROSECUTOR

The main responsibility of a Crown Prosecutor is to the State which he represents to ensure that as far as within him lies, that all the facts surrounding a crime which are properly admissible in evidence and alleged against an accused, shall be brought to light before the tribunal of trial, leaving to that body the task of determining the guilt or innocence of the accused.

Notwithstanding the fact that the chief interest of the Prosecutor is that of the State, he, nevertheless, has a very real responsibility to an accused person and his Counsel.

While I have steadfastly maintained that as a matter of law there is no more obligation on the Crown to disclose its case to the defence than there is for the defence to disclose its case to the Crown, the fact remains -- and I am speaking generally -- the Crown Prosecutor provides the defence when requested with the evidence in its possession which it intends to adduce, touching the guilt or innocence of an accused person, such as:

- (1) Names and addresses of Crown witnesses (often subsequently interviewed by defence Counsel).
- (2) The statements or confessions of an accused
- (3) Reports of medical or psychiatric examinations
- (4) Reports of scientific experiments, ballistics, blood, textiles, etc.
- (5) Copies of documents, plans and photographs, etc.



This generosity on the part of the Crown Prosecutor in Canada apparently does not exist to such an extent on the part of the Director of Public Prosecutions in England.

Last, but by no means least, there is a very real duty and responsibility on the part of a Crown Prosecutor to the Court. The Prosecutor like any other member of the Bar, is an officer of the Court, but in a criminal prosecution his responsibility would seem to be greater than Counsel in a Civil case. The Court often relies on the Prosecutor, who has the carriage of the proceedings, to see to it that the Rules of Practice are followed and the presiding judge often seeks his guidance when difficult situations arise, requiring the Court's decision. The presiding judge is in the nature of an umpire, independent, unbiased, and his duty during the trial is directed to the end that the rule of law is obeyed as between the Prosecution and the Defence, so that an accused person is ensured of receiving a trial according to law. A Prosecutor should never transgress or attempt to transgress the rules of evidence in order to bring out facts otherwise inadmissible, and should accept the rulings of the Court with grace and courtesy.

It not infrequently happens that during the course of a trial, situations may arise whereby the Crown Prosecutor is enabled to take an unfair advantage of the defence but a Crown Prosecutor, true to the traditions of his Office, should never permit himself to be guilty of any sharp or unfair practice to promote his own prestige or the case of the Crown, which might prejudice the fair and legal trial of an accused person.

While the Crown Prosecutor's banner should be emblazoned with the classic motto -- "Numquam Rex Lucratur, Numquam Rex Spoliatur" -- "The Crown never wins: the Crown never loses", this should not, however, deter him for one instant from conducting a criminal prosecution in such a manner that justice based on truth shall triumph.

#### Discretion of the Crown Prosecution in Laying Charges

As intimated earlier it is no part of the duties of the Crown Prosecutor to initiate a prosecution. This is done usually by the Police or private citizens. His responsibility, when consulted, is to advise the Police during their investigation, and when the investigation is completed, to offer guidance as to the proper charge that should be laid. It not infrequently happens that the facts and circumstances create a borderline case and the Crown Prosecutor is then faced with the task of deciding whether the more serious or lesser charge should be laid. He, of course, cannot be guided by any rule of thumb processes, but must exercise his discretion as best he can. There may be circumstances in the case which might motivate him in advising that a lesser charge be laid, than those circumstances at first glance would seem to justify.





In the realm of homicide, if the case appears to be on the borderline between murder and manslaughter, an experienced Crown Attorney should not determine the matter himself but should advise the laying of the murder charge, leaving it to the grand or petit jury, according to their jurisdiction, to determine whether it be murder or manslaughter. The responsibility of making such a decision is very great and a Crown Attorney should not be called upon to exercise any discretion in such a case.

Any discretion exercised by a Crown Prosecutor should be in accordance with all the circumstances within his knowledge, and while he has the conduct of the proceedings, he must not prejudice justice by substituting his opinion as to the result, for that of the tribunal of trial.

I have been asked sometimes, if this is the case, why a Crown Prosecutor will exercise his discretion and consent to a plea of a lesser offence after the trial has proceeded, for instance, at the end of the Crown's case. The answer is, of course, almost obvious for example, the charge is Murder -- during the Crown's case and from its own witnesses it develops that the accused was so intoxicated that he was unable to form the intent to kill. It may have developed that the question of intoxication to that degree had gone far beyond raising any reasonable doubt but was an established fact by the Crown's own witnesses. At the end of its case, having regard to the fact that the onus is on the Crown throughout the trial to prove the guilt of the accused beyond a reasonable doubt, it becomes then quite apparent that it is useless to ask a jury to return a verdict of Murder when all the evidence against the accused in the Crown's case points to manslaughter. As the jury, upon proper instruction by the Trial Judge, would inevitably have to return a verdict of manslaughter on such evidence, the defence, not being required to offer any evidence whatsoever, the "acceptance" of a plea of guilty with the consent of the Trial Judge, to the lesser offence of manslaughter is, in my opinion, quite justified. The Judge would then direct the jury accordingly, resulting in a verdict of manslaughter.

#### PUNISHMENT

The first duty of the State is to re-assert the criminal law, which has been broken, against the offender; for this reason, it must affirm his guilt and deal with him in accordance with it.

John Ruskin once suggested, and apparently with serious intent, that in order to assert effectively the corporate responsibility of mankind, the whole apparatus of detection and trial in cases of murder should be abolished; the country should be divided into administrative areas, and if a murder were committed in one of them, lots should be cast and an inhabitant of the area so selected should be hanged. He even





urged that this method would reduce the number of murders by the stimulus supplied to the common sense of responsibility. No doubt it would reduce the official figures entered for murder, for it would lead each member of the jury to support a verdict of suicide or accidental death from fear lest otherwise the lot should fall on himself; but this was not the philosopher's intention. He was concerned with an important principle, but hit on an unhappy method of applying it. For it is the main point in the theory of punishment that the penalty must be visited on the guilty party.

It is perhaps in the field of punishment that the influence and cooperation of the Crown Prosecutor in proper circumstances may be most helpful to a person who has been convicted and is awaiting sentence. It is not unusual for the Court to seek the views of the Prosecutor in open Court before sentence is passed. His experience tells him what the appropriate sentence should be, having regard to the nature of the crime, the facts of the case, the criminal record of the accused, and his chance and prospects of rehabilitation.

The Right Honourable Sir Herbert Samuel once said: --

"The way in which a nation treats crime is one of the tests of its civilization. The simple, primitive method is to take as the starting point a crime which has been committed and to limit social action to catching the criminal and to penalizing him. This is done according to a standardized tariff which "makes the punishment fit the crime." The method adopted by an advanced community is different and less simple. It aims at finding the general and the particular causes of crime and dealing with them. When, nevertheless, crimes are committed, the treatment of an offender is directed more to obviating his committing a second offence than to his merely paying retribution for the first. In cases where punishing is inevitable, the penalty should be devised so as to fit the character of the criminal not less than the character of the crime. How far these methods can safely be carried, and in what form they can be most successful, is the subject matter of the science of Penology. One point is generally agreed; when a case is tried, the Court should be informed, not only of the facts with regard to the crime itself, but also of the facts with regard to the character and circumstances of the offender. Further, when the trial is over and sentence has been passed, it should not be thought that the matter is finished so far as the community is concerned. It is essential that efforts should be made to give to the offender training and care, guidance and help. These are becoming recognized, in this Department of the social life of the modern world, as the right principles of Law and practice."



An experienced Crown Prosecutor should, I am convinced be constantly reminded of the precepts so ably expressed and, notwithstanding a vigorous prosecution, the Crown Prosecutor's attitude on the question of Punishment is sometimes found in sharp contrast with his forthright conduct during the trial. Furthermore, it is the duty of a Crown Prosecutor, both as an official and as a private citizen, to assist the Court in dealing with a wrongdoer if there are any reformative aspects in the personality of a convicted person, especially the first offender. He should not, in any circumstances, press for an excessive sentence or raise objection, or obstruct the Court if the Court feels that under the circumstances an appropriate reformative type of sentence is indicated. Nevertheless, however, in the case of recidivists or habitual criminals where all prospects of rehabilitation are conspicuously absent, he should take a firm stand on the question of sentence as punishment for the offender, as a deterrent to others, and for the protection of society which he, the Prosecutor, by his official capacity, represents.

I cannot over-emphasize that the discretion of the Court on the question of punishment, is paramount; it must make up its own mind as to the proper disposition of the offender qua punishment, but the Court is often so assisted in this disagreeable task by an experienced and competent Crown Prosecutor. Pre-sentence reports furnished by the Crown through the Agency of the Probation Services are, of course, invaluable and their increased use should be encouraged.

### Appeals

In the Court of Appeal, Counsel representing the Crown, where it is clear that a conviction is bad in law, should announce to the Court as soon as conveniently possible, that upon due consideration of the case, he cannot support the conviction. Such action by the Crown results in eliminating futile and unnecessary argument, thus saving the valuable time of the Court. It is in this Court that Crown Counsel is of great assistance to an offender in proper cases where the prisoner appeals against his sentence. It is not unusual if it is thought that the record is incomplete, for the Crown Counsel to request an adjournment of the case in order that additional information which may be favourable to the prisoner, may be obtained at the expense of the prosecution.

While I am on the subject of appeals to the Court of Appeal in cases of indictable offences, I would like to emphasize the part that should be played by the Crown in cases of appeals in writing (In Forma Pauperis) as they are commonly called. I am confident that very little is known by the legal profession as to the invaluable assistance given to indigent prisoners whose cases have merit and who desire to have their conviction or sentence reviewed by an Appellate Court. In substance, an appeal of this character is an aspect of Legal Aid for needy persons, although not strictly falling with the ambit of the Legal Aid Scheme adopted



in Ontario. By this, I mean Legal Aid for needy persons, generally speaking, does not extend to appeals in either civil or criminal cases.

The Crown has provided the Heads of all Penal Institutions in Ontario with blank Notices of Appeal forms. If an indigent prisoner feels that he has been wrongly convicted, or has received an excessive sentence, he may fill out the appeal forms and send them to the Registrar of the Supreme Court of Ontario at Osgoode Hall, Toronto. These applications are individually considered by designated members of the Court of Appeal, who determine whether leave to appeal should or should not be granted; the decision being based upon a full report on the case from the presiding Trial Judge or Magistrate, as to the facts including the criminal record, if any, of the applicant. If leave to appeal is granted, the Crown immediately takes over and completes the appeal without expense to the prisoner. This entails copying numerous documents, reports and the preparation of formal Appeal Books for the use of the Court of Appeal. I cannot over-emphasize the fact that there is no obligation whatever on the Crown to provide this gratuitous service to indigent persons but does so to ensure that no man's case shall go unheeded or unheard, for reason only of lack of funds to prosecute an appeal. Crown Counsel appears on the hearing of these appeals and occasionally Counsel for the prisoner is supplied by the Registrar when requested by the convicted person, from a list of barristers who gratuitously offer their services in such cases. This practice has been in force for many years and the number of indigent prisoners who have secure relief by this practice, is legion. In the case of indigent prisoners convicted of murder, desiring to appeal, the generosity of the Crown is much greater. On being satisfied that the condemned man is without means to retain his own Counsel to prosecute his appeal in the ordinary way, the Crown authorizes payment from public funds the cost of transcribing the evidence for use on appeal. Travelling and living expenses for out-of-town Counsel retained by the appellant are also paid for by the Crown and in the event of an application by the prisoner for leave to appeal to the Supreme Court of Canada, the Crown again provides the funds for the perfecting of the appeal and the payment of travelling and living expenses of Counsel of his own choice while in Ottawa.

As mentioned before the interests of the Crown and the Crown Prosecutor are not confined solely in obtaining convictions and jailing the offender, or sending him to the gallows, but reaches much deeper, ensuring that every possible means is at the disposal of a convicted person so that not only Justice, but also the appearance of Justice, is extended to those unfortunate individuals whose cause might otherwise be neglected.

My remarks on this gratuitous assistance provided by the Crown might appear to digress somewhat from the subject of the role of the Crown Prosecutor but as the Crown is represented by the Prosecutor, the matter is not unrelated.



Conclusion

It will be appreciated, I am sure, from what I have somewhat imperfectly said, that the task of the Crown Prosecutor is not an easy one. The vigilance demanded of him to see that no injustice or unfairness is done to an accused person and, at the same time, to carry out his duties in a determined and steadfast manner, to protect society from a possible miscarriage of justice, demands from him an astute and clear mind, and an unswerving devotion to duty.

One of the cliches often heard in respect to the administration of criminal justice is -- "That it is better that ninety-nine guilty men should go free, than one innocent person be convicted." This is simply another way of saying that there should be no miscarriage of justice in the case of the one man irrespective of the fate of the other ninety-nine. In supporting the principle enunciated by this maxim, if it can be called such, I would add this: "That it is the unquestioned duty of the Crown Prosecutor to prevent the escape of the guilty ninety and nine, and to ensure the acquittal of the innocent one."

(From Chitty's Law Journal, Vol. 14 No 1, January 1966)







## THE ROLE OF CROWN COUNSEL

## IN CANADIAN PROSECUTIONS

(1962 - 40 CANADIAN BAR REVIEW - 439) -

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(Of the Manitoba Law School, Winnipeg. This article is based upon a paper accepted for the Harvard Law School LL.M. degree. As the original of this article is readily available, all but a few footnotes have been omitted. A footnote in the original is indicated by an asterisk (\*).

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It is true that in the receiving of justice the king stands in an equal position with the least of his kingdom. On the other hand, it is also true that in power he is superior to all. Even so, the hard of the king ought to be in the hand of God, so that his power may not be unbridled. Let him therefore apply the bridle of temperance and the reins of moderation, lest unbridled power should lead to lawlessness.

Bracton\*

INTRODUCTION

A miscarriage of criminal justice at home may have local, national and international consequences. The same is no less true of alleged miscarriages. A decision by an Attorney General or prosecutor to prosecute or not to prosecute, or to enter or not to enter a nolle prosequi, each of which calls for the exercise of a discretion, involves considerations which go to the very root of what may be termed "the notions of justice of English-speaking peoples".\*

"Assuredly the theory repeatedly advanced", said Commissioner Nielsen in *Janes (United States v. Mexico)*,\* "that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because, by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary". An Attorney General or prosecutor, in the exercise of his discretion in criminal proceedings, may be regarded as just at home and unjust abroad, or unjust at home and just abroad.

This article is concerned with the conduct and with the exercise of the discretion of Attorney Generals and crown counsel in Canadian criminal prosecutions, in the light of the Canadian Bill of Rights.\*



The question naturally arises as to what roles justice, law and politics play in criminal prosecutions. In considering this question, I shall have occasion to refer to the position of an Attorney General, and of course of counsel for the prosecution, in England, the United States of America and Canada.

Part I of this article deals with the nature of the office of Attorney General and prosecutor, and with the local and national aspects of the exercise of their discretion in a nation that is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person in a society of free men and free institutions, and in which it is recognized that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.\*

Part II deals with the conduct of criminal litigation, and endeavours to point out some of the main principles to which an Attorney General and counsel for the prosecution must adhere in order to ensure that an accused person shall receive a fair trial in accordance with the Bill of Rights.

The article ends with certain conclusions to be drawn from the nature of the office of Attorney General and prosecutor, and the principles which govern them in the conduct of criminal litigation.

#### I. The Nature of the Office of Attorney General and Prosecutor

"I die the King's good servant", Sir Thomas More proclaimed from the scaffold, "but God's first".\* A present-day Canadian Attorney General or prosecutor is not a servant of the Crown, a servant of his party, a servant of the government, a servant of Parliament, or a servant of the rigour of human positive law. Rather, he is a servant of justice. He should too, like More, be a servant of his God, and should listen to the teachings of that law which St. Paul said was written in the hearts of men.\* I am speaking now, of course, of the position of the Attorney General or prosecutor so far as discretion in connection with the criminal process is concerned. It is not without significance that it is the Minister of Justice who is the Attorney General of Canada.\* Nor is it without significance that he is a Member of Parliament and a Member of the Cabinet.

The extent to which the principles which are enshrined in the Canadian Bill of Rights\* and the Universal Declaration of Human Rights\* are respected and applied in the spirit, as well as in the letter, depends to a large extent upon the manner in which the powers, the duties, and the discretion of an Attorney General and prosecutor are exercised and fulfilled in practice. "What are the respective roles of justice, law and politics?" -- is a fundamental question. Wrong answers can relegate the Bill and the Declaration to nothing more than words, albeit inspiring



words, on paper. Moreover, as has already been indicated, not only local and national, but also international implications flow from the manner in which an Attorney General or a Prosecutor conducts himself in office.

When and why should he prosecute? When and why should he not prosecute? When and why should he enter a nolle prosequi, or not do so? Are Attorneys General and prosecutors "the bloodhounds of the Crown"\*, or of a political party, or of the government or of Parliament? Is the term "blood-hound" appropriate, in any context, to describe the office? Whatever may have been the situation in early Stuart times, today's answer to these questions is an unequivocal, no.

It is obvious from the nature of his office that an Attorney General, and this is no less true of counsel for the prosecution, must stand above and apart from the clamour of the crowd -- from the rich, and the poor, and the in-betweens. A certain person or group of persons may urge or insist that a prosecution be launched, and that it be pursued to the end that a conviction will be obtained. In other circumstances, a certain person or group may insist that a prosecution should not be launched, or if already launched that it should be discontinued. Or, even, that it should be conducted in such a way that an acquittal will be likely to result. The question immediately arises: how does an Attorney General, or prosecuting counsel, stand in relation to the matter of convictions and acquittals?

It is no secret that in England, in Canada, and in the United States of America, there have been times and circumstances in which the conduct of an Attorney General or prosecuting counsel has been deserving of criticism and censure. It is no secret either that, notwithstanding bills and declarations of rights, examples of this can be found at the present day: examples which make a mockery of "due process of law", "fair hearing in accordance with the principles of fundamental justice", "an impartial tribunal", "notions of justice of English-speaking peoples", and the like. But English-speaking peoples have no monopoly in regard to these lapses.

Mr. Emlyn in his preface to the second edition of the State Trials had this to say, in part, in connection with the criminal process:

Some (members of the Bar) he will find, pressing nothing illegal against the Prisoner, nothing hard and unreasonable (however in strictness legal) using no artifices to deprive him of his just Defence, treating his Witnesses with decency and candour; being not so intent on convicting the Prisoner, as upon discovering Truth, and bringing real Offenders to Justice; looking upon themselves according to



that famous Saying of Queen Elizabeth, no so much retained pro Domina Regina, as pro Domina Veritate (3 Co.Instit.79.).

These will appear in a different light from others, who with rude and boisterous language abuse and revile the unfortunate Prisoner; who stick not to take all advantages of him, however hard and unjust, which either his ignorance, or the strict rigour of Law may give them; who by force or stratagem endeavour to disable him from making his Defence; who brow-beat his Witnesses as soon as they appear, tho' ever so willing to declare the whole truth; and do all they can to put them out of countenance, and confound them in giving their Evidence; as if it were the duty of their place to convict all who are brought to Trial, right or wrong, guilty or not guilty; and as if they, above all others, had a peculiar dispensation from the obligations of Truth and Justice. Such methods as these should be below men of honour, not to say men of conscience: yet in the perusal of this Work, such persons will too often arise to view; and I could wish for the credit of the Law, that that great Oracle of it, the Lord Chief Justice Coke, (See the Trial of Sir Walter Raleigh, A.D. 1603.) had given less reason to be numbered among them.\*

Attorney General Coke's performance is too well known to warrant repetition here. It is sufficient to recall that he saw fit to address Raleigh at his trial with such expressions as: "I will prove you the notorious Traitor that ever came to the bar"; "thou art a monster; thou hast an English face, but a Spanish heart"; "You are the absolutist Traitor that ever was"; "thou Viper; for I thou thee, thou Traitor."\*

Mr. C.P. Harvey, Q.C. has made the observation that the following passage from the address of counsel for the prosecution at the first trial of Alger Hiss in America, "is very much in the style in which Sir Edward Coke used to prosecute":

And again, finally, you are the second jury to hear this story. The grand jury heard the same story. The grand jury heard this traitor and Mr. Chambers, and that grand jury indicted Hiss. It indicted Hiss because he lied. He lied to them, and I submit he lied to you. The grand jury said that he lied twice on December 15th. And as a representative of 130,000,000 people of this country, I ask you to concur in that charge of the grand jury. I ask you as a representative of the United States Government to come back and put the lie in that man's face.\*





In a recent Canadian case Chief Justice Kerwin observed: It is the duty of crown counsel to bring before the Court the material witnesses,.....In his address he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language his own personal opinion that the accused is guilty, or when his remarks tend to leave with the jury an impression that the investigation made by the Crown is such that they should find the accused guilty.\*15

It must be emphasized that it is not the aim of an Attorney General or of counsel for the prosecution to obtain convictions in criminal proceedings. Nor, in any case, should it be permitted even to appear that such is his aim. It is essential that this be kept uppermost in the mind when one considers the discretion that he has regarding the institution, conduct and discontinuance of criminal proceedings. For the benefit of non-Canadian lawyers it must be pointed out that in Canada, Criminal law and procedure are federal matters, enforced by provincial officials in provincial courts, presided over by federally appointed judges.\* Under the Canadian constitution, the Queen, by and with the advice and consent of the Senate and House of Commons, may make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures. It is expressly provided in the British North America Act of 1867\* that the criminal law, except the constitution of criminal courts, but including the procedure in criminal matters, is within the legislative field of the Dominion, that is, the federal authority. The provinces, on the other hand -- and this of course involves the provincial Attorneys General and prosecutors -- have the responsibility for the administration of justice in the provinces. The provinces attend to the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction.\* The provinces may enact legislation dealing with the imposition of punishment, by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects in respect of which the provinces have jurisdiction.\* The dividing line between criminal law and law of the kind just mentioned, sometimes termed quasi-criminal law, is by no means always easy to discern in particular cases.\*20

\*15 - Boucher v. The Queen (1955) S.C.R. 16, at p. 19.

\*20 - Certain aspects of a subject may come within the federal field, while others come within the provincial. For example, the negligent operation of motor vehicles on highways.



The federal Department of Justice Act\* provides that the Minister of Justice is ex officio Her Majesty's Attorney General of Canada. The Attorney General is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, so far as those powers and duties are applicable to Canada. He is also entrusted with the powers and duties that, by the laws of the several provinces, belonged to the office of Attorney General of each province up to the time when the British North America Act of 1867 came into effect, so far as those laws under the provisions of that Act are to be administered and carried into effect by the government of Canada.

The Attorney General of Canada has the regulation and conduct of all litigation for or against the Crown or any public department, in respect of any subject within the authority or jurisdiction of Canada. But, as has been noticed, the administration of criminal justice is a provincial matter and, therefore, falls within the responsibilities of the provincial Attorneys General and prosecutors.

The provisions of the Department of Justice Act which relate specifically to the Attorney General raise the question: what are the powers and duties that belong to the office of the Attorney General of England? Certainly they do not now call for, if they ever did in an earlier era of the administration of criminal justice, the kind of inhumane performances of which Emlyn wrote in his preface to the State Trials. And certainly the following is not truly descriptive of the present-day office of Attorney General of England, Canada or a Canadian province:

The nation at large must look upon the Attorney-General as a sort of ministerial spy--an informer of rather a higher rank than those who have recently (1819) become notorious, whose business is to ferret out and prosecute all who either by their actions or writings are endeavouring to displace the personages to whom he is indebted for his situation, or who are attempting to promote any reform in the system they support.\*

When in 1820 (which, incidentally, was the year following that in which wager of battle was abolished by statute in England)\* Sir Francis Burdett said that the Attorney General was not an officer of the Crown, and that "his situation is not permanent; he is dependent upon the administration: he is the creation of its breath, and his official existence expires with the frown of the Minister", he was reprimanded by Mr. Justice Best for these "disrespectful observations".\*

It would seem that there was formerly a considerable difference of opinion as to the responsibility of the Attorney General to the executive. More recently, however, Lord MacDermott, Lord Chief Justice of Northern Ireland, has written:



With some, relatively minor, exceptions the executive must leave the initiation of criminal proceedings by the Crown to the Attorney-General and those for whom he is responsible. The days are gone when a subservient Attorney could be told whom to lay by the heels or whom to spare. He must now maintain a complete independence in this difficult and sometimes delicate sphere, and if he fails to do so, the remedy lies in his dismissal or that of the Administration.

This segregation of powers applies as clearly to calling off prosecutions as to starting them, and is today so well settled and respected that no government wishing to remain in office is likely to ignore it. It springs from a widespread feeling that the administration of the law, and particularly of the criminal law, ought to be altogether above party politics.\*

Sir Hartley Shawcross, now Lord Shawcross, a former Attorney General of England, has said that:".....in the discharge of his legal and discretionary duties, the Attorney General is completely divorced from party political considerations and from any kind of political control." And Mr. Justice Devlin, in the year 1960 testified to the same effect, \*27 supported by the following observation in an address by the Prime Minister in the House of Commons on February 16th, 1959:

It is the established principle of government in this country, and a tradition long supported by all political parties, that the decision as to whether any citizen should be prosecuted, or whether any prosecution should be discontinued, should be a matter, where a public as opposed to a private prosecution is concerned, for the prosecuting authorities to decide on the merits of the case without political or other pressure.\*

Domestic courts may not review the motives of an Attorney General or prosecutor in the exercise of his discretion to prosecute or not to prosecute, or to continue or to discontinue criminal proceedings. There must be no judicial interference with the discretion vested in a minister of the Crown.\*

In the United States there has been powerful criticism of the role which party politics have been allowed to play in the matter of criminal prosecutions. This is particularly the case, of course, where prosecutors are elected. Dean Pound's criticism of the American system states that the office of prosecutor is used as a political stepping stone, that the prosecutors point with pride to their records of convictions obtained, and that every opportunity for sensationalism and publicity is turned to political advantage:

\*27 - Devlin, The Criminal Prosecution in England (1960), p. 18.





.....politics are a check in an improper sense, hindering (the prosecutor) from doing what he should. Today, political pressure upon prosecutors, except in rare intervals of political upheaval, is a weapon against society, not a shield of the innocent individual citizen.....Any program for bettering our administration of criminal justice must seek to take prosecutions out of politics...\*

Dienstein,\* and Sutherland and Cressey, \* also point out the evils of the absence of separation of prosecutions and politics, and to the vulnerability of the discretion of the prosecutor in this regard.

Despite such criticisms, some American prosecutors continue to point with pride to their record of convictions obtained, continue to take part in criminal investigation, and continue to have their picture and statements published in newspapers in connection with reports of criminal cases. The damage which their conduct does, in the United States and abroad, is immeasurably great. They would, perhaps, be shocked at the following description of the function of counsel for the prosecution:

Let me explain to you in a word what my position as Attorney General, or what in fact the position of any prosecuting counsel in this or in any criminal case, is. I am not here to endeavour to secure a conviction and to try to ride round and escape from the rules of fairness or anything of that sort. My task is merely to put before you as best I can the plain unvarnished facts, without rhetoric and without emotion, in order that you may be assisted to come to your decision as to whether or not these defendants are or are not guilty of the offences with which they are charged.\*33

In an address before a conference of United States Attorneys in 1941, Attorney General Robert H. Jackson emphasized the problem of selection of cases for prosecution:

One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints.....What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offence is the most flagrant, the public harm the greatest, and the proof the most certain.

\*33 - Soonavala, Advocacy (2nd ed., 1960), p. 317.





If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost any one. In such a case it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offence on him. It is in this realm-in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offence, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.\*

It is evident that the discretionary power of the Attorney General, and of individual prosecutors, is such as to be capable of being made an instrument for justice or an instrument for injustice. Dean Pound has referred to it as "one of a great series of mitigating agencies whereby individual offenders may be spared or dealt with leniently".\*

In some cases individuals have attempted (sometimes with success) to use the criminal process to serve their own private ends. They have sought to make use of it where civil remedies were available to them. This has been condemned in Canada.\*<sup>36</sup> Attorney General Jackson had occasion to deal with this aspect of the criminal process in connection with criminal libel, and he adhered to the policy of declining to prosecute such cases where a civil remedy was open to the individual concerned, and where there had been no breach of the peace or other public injury done by the libel.\*

The nature of the office of Attorney General and prosecutor requires that political, personal and private considerations shall be set aside so far as the exercise of the discretionary power which is inherent in the office, in connection with the criminal process, is concerned. The discretion must be exercised solely upon grounds calculated to maintain, promote and defend the common good.

\*<sup>36</sup> - R. v. Bell, (1929) 3 D.L.R. 931.



## II The Conduct of Criminal Litigation

In determining whether a prosecution should be launched and carried through to a determination on the merits, prosecuting counsel must consider the interests of society as a whole. He must keep in mind the standard of proof required in a criminal case. Failure to do this will result in an injustice to the person who has been put on trial in the face of insufficient evidence. The standard of proof, where the evidence is not wholly circumstantial, is that the accused must be proved guilty, if at all, beyond a reasonable doubt. Attempts at refinement of the term "reasonable doubt" have been, on the whole, eminently unsatisfactory. Where the evidence is wholly circumstantial it is necessary, in addition, that the tribunal be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person". This is the language of Baron Alderson in Hodge's\* case, and the Supreme Court of Canada has held that this language or its equivalent should be used in charging the jury. To obviate the difficulty inherent in determining what is the equivalent, it has been held advisable to use Baron Alderson's words.\*

To commence a prosecution or permit it to continue in the face of these requirements, where the evidence forthcoming is not such as is calculated to attain this standard, would be an abuse of discretion. It would amount to the launching of a "fishing expedition" in the hope that sufficient evidence would somehow turn up during the course of the trial. Such a procedure could not be held to meet the test of the principles which underlie the Bill of Rights.\*

One of the most severely criticized criminal proceedings ever to take place in Canada was the espionage investigation of 1946, where a royal commission was created to investigate allegations that a spy-ring was operating in Canada. The disclosures of Igor Gouzenko, a cypher clerk in the Russian Embassy at Ottawa, were such that the Minister of Justice reluctantly invoked a secret order in council that had been inadvertently left in force after the end of the war. As a result, suspected persons were held incommunicado and were questioned in camera without counsel and without protection against self incrimination. In the words of one speaker in the House of Commons: "Indeed, sir, Canada has now seen black days."\* In the words of another: "...detaining and questioning in this fashion has never been resorted to anywhere in this Empire before."\* And in the words of a member of the party in power, a former member of the wartime Cabinet: "....I cannot wish to turn back the pages of history seven hundred years and repeal Magna Charta. I cannot by my silence appear to approve even tacitly what I believe to have been a great mistake on the part of the government."\* With the merits of the case I am not here concerned, but it is clear in any event that the Minister of Justice was in a very difficult position when news of the alleged spy-ring reached him. In his own words:\*



If there had been no legal way of doing it I would have felt no responsibility. But when there was a legal way, when there was a way by which it could legally be done, I could not refuse to take the advice which was given to me. I will not say that I was happy that there was a legal way of doing it. It would have been much more comfortable for me to be able to say, "This cannot legally be done."

The procedure followed in that case does not reflect the usual mode of proceeding in Canadian prosecutions. Standard procedure would have required that the persons be brought before a justice, and that they be accorded the right to counsel. But detention and interrogation by the police is a broad--and difficult--subject. Under section 438 of the Criminal Code of Canada,\* a person who has been "arrested" must be taken before a justice to be dealt with according to law within a period of twenty-four hours, where a justice is available. Where a justice is not available within that period, the person must be taken before a justice as soon as possible. "Detention for questioning" differs from arrest. Without becoming involved in a detailed consideration of this problem, for it is a matter not directly affecting the conduct of prosecuting counsel, as such, it can only be said that "...the law seems to leave the question of how long a suspect may be detained for questioning unanswered, excepting in terms of what is reasonable and practicable".\* For what it is worth, however, the person has a right to keep his silence. In the words of Mr. Justice Devlin:

It is true that the law which gives freedom to the police to question equally gives freedom to the suspect not to answer. Indeed, there is virtually no obligation on anyone to give the police helpful information. If a man positively knew that a felony had been committed and refused to give the police any information about it, he might be guilty of misprision of felony, but this offence is now practically obsolete. *R. v. Aberg*, (1948) 1 All E.R. 601. Otherwise the policeman has no power or privilege; in the eye of the law he is only an interested questioner seeking for information. But in practice he is of course treated very differently. It is probable that even to-day when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least it will be the worse for you if you do not. Apart from this, anyone who is innocent must recognize a strong moral duty to assist the police by giving all the information in his power, and anyone who is guilty must accept the same duty if he wishes to be thought innocent.





The point which must not be overlooked, however, is that there are four main stages through which a person passes in the course of the criminal process: (1) where information is sought from him, in which case he may be termed simply an "interrogee"; (2) where suspicion fastens upon him, in which case he may be termed a suspect; (3) where the suspicion crystallizes and a charge is made, in which case he may be termed an accused; and (4) where the trial process begins, in which case he may be termed a litigant. Throughout this process the person is deemed innocent until proved guilty beyond a reasonable doubt, and if counsel for the prosecution is to proceed in such a manner that an injustice is not to be done him, he must act in a quasi-judicial manner, and not as a detective or as an adversary. Some District Attorneys and prosecuting counsel in the United States take an active part in the investigation of crime in its preliminary stages. Inevitably, they place themselves in a position similar to that of a policeman or detective, and thereby become accusers rather than ministers of justice. When politics is added to this, their opportunity to act in an impartial and quasi-judicial role is seriously impaired if not, indeed, wholly eliminated.

When it has once been determined that a crime has been committed, the possible sources of injustice towards the person suspected of having committed it are almost without limit. There are the matters of confessions and of obtaining evidence by illegal means, to mention but two of the more obvious. But, in addition, at the trial itself, there is the matter of the conduct of counsel for the prosecution. Generally speaking, neither an Attorney General nor counsel for the prosecution has any greater legal rights than any other member of the Bar. They must conform to the rules, and the court exercises the same authority over them as over any other advocate. Nevertheless, a prosecuting counsel has a certain discretion to exercise if an injustice is not to be done to the accused person. For one thing, he must realize that to adopt and seek to follow a doubtful course of action that may be very close to the line, thereby putting defence counsel in the position of having to make objections, can very easily prejudice the accused in the minds of the jurors. An objection by the defence may quite understandably result in the jurors coming to the conclusion that the defence has something to hide. This may, of course, be true. But it may not !

In addition, there is the discretion of counsel for the prosecution as to what evidence he will, or will not, adduce. The judge, too, has a discretion to reject evidence, though it is technically admissible, on the ground that it would be unduly prejudicial to the interests of the accused.

Of one Canadian crown counsel it was said that he was "the thirteenth jurymen".\* This is probably overstating the case, but, properly understood, is not so exaggerated a description of the function of prosecuting counsel as might





at first appear. It is only in the light of considerations such as this that the provisions of the Bill of Rights\* dealing with "due process of law", "a fair hearing in accordance with the principles of fundamental justice", "impartial tribunal"--gain real meaning. Standing by themselves, they are but general propositions. And general propositions, as Mr. Justice Holmes once pointed out, do not decide concrete cases.\*

One of the best guarantees of the fulfillment of the principles that underlie the Bill of Rights, in a criminal trial, is a prosecutor who approaches his task in the tradition so ably described by Attorney General Sir William Jowitt, K.C., noticed earlier.\* It is not his aim to obtain convictions, and the adversary system has no application to his work. This approach does not result in "Casper Milquetoast" prosecutors. On the contrary, it follows inevitably from the principle that the prisoner is deemed innocent until he has been proved guilty beyond a reasonable doubt. And, too, it places prosecuting counsel in a proper role between two extremes. I refer to the matter of "condonation" of crime, to which Commissioner Nielsen referred in *James (United States v. Mexico)*,\* on the one hand, and to tactics such as those of Sir Edward Coke in *Raleigh's case*, to which Mr. Emlyn and Mr. E.P. Harvey, Q.C. referred,\* on the other. In the truest sense of the term, the Crown never wins or loses a criminal case. In an address to which reference has already been made, Attorney General Jackson said: "Although the government technically loses its case, it has really won if justice has been done."\* It would be more accurate to say that the government, in criminal prosecutions, neither wins nor loses, technically, really or otherwise.

It is one thing to say that a crown counsel is a minister of justice. It is quite another thing to determine whether the theory is carried out in practice. I purpose to refer to four subjects of everyday significance in this regard, namely: (1) the matter of the obligation of counsel for the prosecution to adduce the evidence material to the case; (2) his obligations in connection with the cross-examination of the accused person, where he elects to testify; (3) or the obligation of crown counsel to refrain from commenting upon the failure of an accused to testify, where he elects not to testify; and (4) the obligations of counsel for the prosecution in connection with his address to the tribunal. In the ordinary course of events, these questions must arise in every criminal case that proceeds to trial.

It is apparent that in connection with the first-mentioned matter, the obligation to adduce the evidence material to the case, counsel for the prosecution must exercise a discretion. He must "...not hold back evidence because it would assist an accused.....the prosecutor is free to exercise his discretion to determine who are the material witnesses".\* He must, it would follow, approach his task in a manner quite different from that of an advocate in a civil proceeding. The word "material" must be taken to refer to facts which are material



either to guilt or innocence, but in making a judgment in this situation, the crown counsel must have regard to the reliability of the evidence in question. To attempt to go beyond that which has been indicated, and to formulate rules that must govern the exercise of the discretion, would, in effect, be putting an end to the discretion. The consequence of this conduct would be to hinder, rather than promote, the fair and impartial administration of criminal justice. It cannot be the rule that counsel for the prosecution must call each and every person who may be in a position to testify. Mr. Justice Locke, in the Lemay case, asked:\*

...is it to be said that, as a matter of law, the Crown was required to call Lowes as a witness for the prosecution and thus, assuming he should join with Lemay in denying that any such transaction had taken place, assist a guilty person to escape? From a practical point of view, if that was the law, far from furthering the due administration of justice it would, in my opinion, actively retard it. In the case of those engaged in the illicit drug traffic, by working in pairs, the one making the sale would be assured at all times of having a witness with him available, in the case of a prosecution, to join in denying that anything of the kind had taken place and whom the Crown would be bound to call.

Assuming the accused elects to testify, the question arises as to the permissible limits of cross-examination by crown counsel. The prospect of going into the witness box is, even for an innocent person, not a pleasant one. But, pleasantries apart, it may be essential if an acquittal is to result. There are wide differences of opinion as to whether the accused's option to testify or to remain silent is a good thing. In Canada, he may be cross-examined as to previous convictions. On the other hand, if he decides not to testify, neither the judge nor counsel for the prosecution may comment thereon. Cross-examination, then, looms rather large in the minds of the accused and his counsel.

In the case of *Koufis v. The King*,\* in which the accused was convicted of arson, objection was taken by the accused-appellant to the fact that counsel for the prosecution had cross-examined him as to an alleged fire at premises other than those in question. It was alleged that this prejudiced the accused with the jury. Justices Rinfret, Crochet and Taschereau held that a new trial was required:\*

The Canada Evidence Act,\* section 12, says:



"A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction."

If the accused admits having committed the offence, the answer, being a collateral one, is obviously final. If he denies having committed the offence, then the conviction may be proved by legal means provided for in subsection 2,... of section 12. The authority given to the Crown is to cross-examine the accused on previous convictions, but this section 12 cannot be interpreted as meaning that the accused may be cross-examined on offences which he is suspected of having committed but for which he has not been convicted.

When an accused is tried before the Criminal Courts, he has to answer the specific charge mentioned in the indictment for which he is standing on trial, "and the evidence must be limited to matters relating to the transaction which forms the subject of the indictment" (Maxwell v. Director of Public Prosecutions, (1935) A.C. 309). Otherwise, "the real issue may be distracted from the minds of the jury," and an atmosphere of guilt may be created which would indeed prejudice the accused.

All these questions were obviously asked in order to convey to the jury the impression that the accused had set fire previously to another building, and to establish the possibility (sic-probability?) that he committed the offence for which he is now charged. The accused cannot be cross-examined on other criminal acts supposed to have been committed by him, unless he has been convicted, or unless these acts are connected with the offence charged and tend to prove it (Paradis v. The King, (1934) S.C.R. 165, at p. 169), or unless they show a system or a particular intention as decided in Brunet v. The King (1918), 57 Can. S.C.R. 83).

Even though cross-examination on previous convictions goes only to the question of credibility,\* it cannot be said that the Canadian rule is wholly satisfactory. The English rule is preferable. It permits cross-examination only if the evidence is admissible to show that he is guilty of the offence wherewith he is then charged; or he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or he has





given evidence against any other person charged with the same offence.\* The uniform rules of evidence approved by the American Bar Association in 1953 provide that in the case of an accused-witness no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility, unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.\* The indiscriminate use of the Canadian rule would, it is submitted, be inconsistent with the duties of crown counsel, and could very well be held to be a ground for setting aside a conviction and ordering a new trial where it could be shown that the accused was unduly prejudiced.

As was mentioned earlier, the Canada Evidence Act\* prohibits both judge and counsel for the prosecution from commenting upon the failure of the accused to testify and this extends also to the spouse of the accused. In *Bigaouette v. The King*,\* a new trial was ordered owing to the failure of the judge to obey the prohibition contained in the Act. The unanimous judgment of the court was delivered by Mr. Justice (later Chief Justice) Duff in these terms:\*

It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment... upon the failure of la defense to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood the other way, that it seems plainly obnoxious to the enactment...The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex v. Gallagher* (1922), 37 Can. Cr. C. 83), in these words:

"...it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal."





These observations apply equally to the prohibition against comment by counsel for the prosecution. And, again, the Canadian rule differs from the English. The English Act prohibits comment only by the prosecutor.\* The American uniform rules provide that counsel may comment upon the failure of the accused to testify, and that the trier of fact may draw all reasonable inferences from the failure to testify.\* It is submitted that the English rule is consistent with the accused's right to keep his silence, and that it is the preferable rule.\*68 As was pointed out in *Wilson v. United States*: "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him."\* To compound his predicament by permitting comment by the prosecutor on his failure to testify is most unjust.

Finally, there is the matter of crown counsel's address to the tribunal. The subject was thoroughly reviewed in *Boucher v. The King*,\* and, as a result of the language used by crown counsel in that case, a new trial was ordered. Chief Justice Kerwin and Mr. Justice Estey stated:\*

It is the duty of crown counsel to bring before the Court the material witnesses, as explained in *Lemay v. The King* (1952) S.C.R. 232). In his address, he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language his own personal opinion that the accused is guilty, or when his remarks tend to leave with the jury an impression that the investigation made by the Crown is such that they should find the accused guilty.

Mr. Justice Taschereau said:\*

La situation qu'occupe l'avocat de la Couronne n'est pas celle de l'avocat en matière civile. Ses fonctions sont quasi-judiciaires. Il ne doit pas tant chercher à obtenir un verdict de culpabilité qu'à assister le juge et le jury pour que la justice la plus complète soit rendue. La modération et l'impartialité doivent toujours être les caractéristiques de sa conduite devant le tribunal. Il aura en effet honnêtement rempli son devoir et sera à l'épreuve de tout reproche si, mettant de côté tout appel aux passions, d'une façon digne qui convient à son rôle, il expose la preuve au jury sans aller au delà de ce qu'elle a révélé.

\*68 - Originally, I had thought that the Canadian rule was preferable, but one of Her Majesty's judges has since convinced me that I was wrong. I am now of the opinion that it should be open to the presiding judge to explain carefully the position of the accused in this regard to the jury. Indeed, I think it incumbent upon him to do so.



Mr. Justice Rand observed that the irregularity in question touched:

...one of the oldest principles of our law, the rule that protects the subject from the pressures of executive and has its safeguard in the independence of our courts. It goes to the foundation of the security of the individual under the rule of law.

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.\*

Mr. Justice Locke reviewed a large number of authorities and observed that the duty of persons who are entrusted by the Crown with prosecutions in criminal matters "does not differ from that which has long been recognized in England", and that it is improper for crown counsel to express his own opinion as to the guilt or innocence of the accused.\* Mr. Justice Cartwright also emphasized the illegality of the latter.\*

### Conclusion

The fact is that "most problems of man and society are very old",\* and that includes the problem of the role of prosecutor. It may be thought by some that things have changed to such a degree -- and here I have in mind what seems to be the growth of organized crime as a large scale operation which parallels, or almost parallels, the operations of the government itself and of the larger corporations -- that the idea that the adversary system does not apply in criminal prosecutions is no longer a tenable one. It may be thought by some that under modern conditions, it is necessary to fight fire with fire, even though that involves placing counsel for the prosecution in the position of the enemy of the man in the prisoner's dock. However, it is still essential that that man be deemed innocent until proved guilty. And so long as this is the case, it remains essential that counsel for the prosecution shall continue to act as a minister of justice, and not as an advocate in an adversary proceeding.



Attention was directed earlier in this article to the question as to what roles justice, law and politics play in criminal prosecutions. If they are to be conducted in a manner consistent with the Bill of Rights, it is essential that politics be eliminated, that the strict rigour of the criminal law shall not be applied without regard to the circumstances of particular cases and that justice shall be the governing factor. This, in turn, requires that a discretion as to when to prosecute and when not to prosecute shall be vested in someone. It cannot very well be vested in judges, and it most certainly cannot be left to politicians. It must, then, be left to prosecutors who are neither the one nor the other. The English system of prosecution places the government and the police at the mercy, so to speak, of the Bar. As Mr. Justice Devlin has pointed out: "...the policeman, like any other litigant, is to a large extent in the hands of his counsel; and to try to advance one's case by means of some unfair practice is not much good if one's counsel is not going to aid and abet."\* It is true to say that this system applies in the main in Canada, but there prosecutors are generally engaged as such on a full-time basis with the result that there is the danger (sometimes fulfilled) of their becoming what may be termed "conviction-minded". In parts of the United States this danger is made much greater by reason of the political implications of the office of prosecutor.

If, in criminal prosecutions, the Bill of Rights\* is to be put into practice, it is essential that the English approach to the criminal process be followed. It is essential that the prosecutor, to borrow from Bracton, should "apply the bridle of temperance and the reins of moderation, lest unbridled power should lead to lawlessness".\*

Indeed, the discretion of an Attorney-General and of a prosecutor, is in the language of Jackson, "tremendous".\* It is such that he could, if he should abuse his discretion, render the preamble and the operative part of the Bill of Rights a dead-letter so far as the individual is concerned. A prosecution launched in a case where the evidence is not calculated to meet the standard of proof of guilt beyond a reasonable doubt, plus the rule in Hodge's case\* where the evidence is wholly circumstantial, or a prosecution viciously pursued with the sole aim of obtaining a conviction, makes the terms "dignity and worth of the human person" and "freedom...founded upon respect for moral and spiritual values and the rule of law" entirely meaningless for the individual who is being prosecuted.\* We may well ask ourselves, in the language of Cardozo, whether the law, and here I refer particularly to the criminal law, has "been purged and sanctified and dignified so that Socrates and Raleigh and the witches-- the ugly, the alien, the unpopular, the bothersome-- would fare better at its hands today?"\* The answer is clear:



it has been purged and sanctified and signified. But law must be administered by men, and when we speak of the criminal law, we must keep in mind that the men who are most closely connected with its administration are the Attorneys General and counsel for the prosecution. These men must be guided by that law, mentioned earlier, which St. Paul said is written in the hearts of men.







